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LITIGATION IN AFRICA

ISLA INSIGHTS

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3

Comparative Perspectives on Amicus Curiae Practice in Africa

Edited by Dr Ruth Nekura, Sibongile Ndashe & Dr Obonye Jonas

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Table of Contents

ACKNOWLEDGEMENTS	i
FOREWORD	3
CHAPTER 1: INTRODUCTION	5
1. About The Initiative for Strategic Litigation	5
2. Purpose	5
3. Historical Origins and Theoretical Underpinnings of Amicus Curiae	5
4. Comparative Perspectives: Overview of Chapters	7
CHAPTER 2: FRIEND OF THE COURT: PRACTICES BY KENYAN COURTS IN ENRICHING JURISPRUDENCE THROUGH THE AMICUS PROCEDURE	10
1. Introduction	10
2. Historical Context of Amicus Curiae: Pre and Post Constitution of Kenya, 2010	10
2.1. Pre-Constitution of Kenya, 2010	10
2.2. Post Constitution of Kenya, 2010 and entrenchment of the friend of the court in the law	11
3. The Statutory and Legal Foundation for Admission of the Amicus Curiae	12
3.1. The magistrates' courts	12
3.2. The High Court	13
3.3. Court of Appeal	13
3.4. The Supreme Court	14
3.5. The practice before the courts	15
3.6. The question of costs for or against amicus curiae	16
4. The Contribution and Future of Amicus Curiae	17
5. Conclusion	19
CHAPTER 3: THE AMICUS CURIAE CONTEXT, LAW AND PRACTICE IN BOTSWANA	20
1. Introduction	20
2. The History and Evolution of Amicus Curiae Participation in Botswana	20
2.1. The Rules of the High Court	21
2.2. The Court of Appeal Rules	22
3. Practice of Amicus Curiae in Botswana: Stocktaking, Impact and Future	23
4. Conclusion	28
CHAPTER 4: THE AMICUS CURIAE CONTEXT, LAW AND PRACTICE IN UGANDA	29
1. Introduction	29
1.1 Background	29
1.2. The meaning of 'amicus curiae'	29
2. The Historical Context of Amicus in Uganda	30
2.1. Pre- and post-colonial Uganda – the law and practice of amicus curiae prior to 1995	30
2.2. Subsequent developments – the law and practice of amicus curiae after 1995	30

3. Uganda's Case Law on Amicus Curiae Practice	33
3.1. Case law prior to 1995	33
3.2. Case law after 1995	34
4. The Future of Amicus Practice in Uganda	37
5. Conclusion	38
CHAPTER 5: THE AMICUS CURIAE CONTEXT, LAW AND PRACTICE IN MALAWI	39
1. Introduction	39
2. Historical Context of Amicus Curiae	39
3. Amicus in Practice	40
4. The Future of Amicus in Malawi	43
5. Conclusion	45
CHAPTER 6: THE AMICUS CURIAE CONTEXT, LAW AND PRACTICE IN NIGERIA	46
1. Introduction	46
2. Historical Context	46
3. Case Law	47
4. Future of Amicus Curiae	49
5. Conclusion	50
CHAPTER 7: THE PRACTICE OF AMICUS CURIAE IN AFRICA: THE CASE OF BURKINA FASO	51
1. Introduction	51
2. Background	51
3. Case Law	53
4. The Future of Amicus Curiae in Burkina Faso	54
5. Conclusion	55
CHAPTER 8: THE AMICUS CURIAE CONTEXT, LAW AND PRACTICE IN SOUTH AFRICA	56
1. Introduction	56
2. History of Amicus Curiae in South Africa	56
3. Amicus Curiae Development Through the Courts	57
4. Gaps, Opportunities and the Future of Amicus Curiae Practice	59
6. Conclusion	60
AUTHOR PROFILES	62

Foreword

Amicus curiae interventions have contributed to the development of landmark feminist jurisprudence before domestic and international fora. The work of feminists continues to show how the law is gendered and imagine how a just and equal world can be shaped using the law. This publication is the first of a multi-phase process that seeks to understand the opportunities and challenges of using amicus curiae before domestic courts in the continent. Other phases will provide an in-depth comparative analysis of the practice before the various continental accountability mechanisms. Finally, this project seeks to achieve the development of a model law on amicus curiae to standardise the practice and develop a shared understanding on the role of these briefs.

The development of gender equality jurisprudence remains a contested terrain. Courts struggle to understand substantive equality for women in a range of factors. In the first wave of constitutions in common law Africa there was the persistent claw-back clause that provided the right to be free from discrimination and proceeded to claw-back on personal and family law. These made a number of gender discriminatory laws and practices continue thriving.

Other laws where formal equality applied were slowly replaced with progressive laws. With most of the claw-back clauses now repealed in most constitutions, the inability to see, acknowledge and remedy substantive inequality persists. Very few jurisdictions have developed jurisprudence that recognise secondary-victimisation, rape myths and gender stereotypes as manifestations of gender-based violence that can be addressed using legal standards that pronounce violence against women as a form of discrimination.

The piecemeal evolution and lack of clear procedures and definitions of what amicus curiae interventions are is partly responsible for the uneven, confusing and at times chaotic application of the procedure. The absence of clarity starts at what is considered desirable in the form of cooperation between the parties with some applicants believing that a letter to an intended amicus curiae disapproving of their intention to intervene should be sufficient to ward off the unwanted intervention.

On the other extreme, it is the parties who blur the lines by engaging with an amicus curiae like it is their friend, not the court's. This includes parties who form coalitions that include amicus curiae and agreements on arguments to be submitted by various amici. Lack of clarity on who can intervene has also led to mixed jurisprudence on the type of interest that the intended amicus curiae should or not have in the subject matter with some courts founding that some amici are too interested in the subject even when they are not parties to the case. The information that amicus curiae should provide to the court also varies with some making submissions that would not be remiss in briefs submitted by the parties or unclear on the guidance that is supposed to be provided to the court. In some countries, the lack of consistency between different courts have seen parties admitted as amicus curiae in the high court, turned into respondent before the appellate division and later converted to amicus curiae again at the supreme court.

This compilation is a plea for coherence and clarity in the practice of amicus curiae procedure across the continent. The next phase of the project will focus on the practice of amicus curiae procedure before the continental accountability mechanisms. At first glance, some of the challenges that are experienced at domestic level are also seen in some of these mechanisms and others have their unique challenges with Banjul leading the pack. The continued misapplication of art 59(3) of the African Charter on Human and Peoples' Rights where confidentiality is mistaken for secrecy has given rise to a practice where parties are prohibited from sharing cases that are pending before the African Commission on Human and Peoples' Rights which itself also has not begun sharing information on pending cases.

All of these inconsistencies are taking place when the rules of procedure permit people to intervene as amicus curiae.

It is therefore fitting that the required standard-setting work should also happen at a continental level. The development of a model law on amicus curiae procedure is the envisaged third phase of the project. The develop of progressive feminist jurisprudence needs all the friends that it can get.



Sibongile Ndashe
ISLA Executive Director

CHAPTER 1: Introduction

1. About ISLA

The Initiative for Strategic Litigation in Africa (ISLA) was founded in 2014, as a non-profit organisation registered and based in South Africa with a mandate to establish and develop a feminist and Pan African approach to strategic litigation as a powerful tool for social change. We believe that strategic litigation can reframe understandings of entitlements before the law, challenge legal discourse on human rights violations, hold states and non-state actors accountable to violations of human rights and develop new norms. We understand strategic litigation as a tool alongside others in advancing social justice for all, with a focus on women and people who are marginalised based on sexual orientation, gender identity and expression. We have begun this work with a focus on engaging the rule of law within African domestic and regional courts to advance sexual rights, particularly on sexual orientation, gender identity and expression, and women's human rights.

2. Purpose

The purpose of this publication is to provide comparative perspectives on amicus curiae practices in seven different African countries, to map best practices at the domestic level and contribute to ongoing conversations about the need to clarify rules and standardise best practices at various levels, including sub-regional and regional human rights mechanisms.

Amicus curiae interventions have been successfully used to advance the courts' understanding of normative frameworks and human rights standards, especially on women's rights and sexual rights. This is because these areas of law continue to resist reform despite numerous human rights instruments, soft law, legislative and policy developments. The use of amicus curiae is important in these areas of law because it is an opportunity to provide guidance to the courts on international and regional normative human rights standards. This publication is intended to generate discussion on amicus curiae practices in African domestic contexts and feed into broader debates on developing, strengthening, standardising or enhancing clarity of amicus curiae procedures in regional and subregional human rights mechanisms in Africa.

3. Historical Origins and Theoretical Underpinnings of Amicus Curiae

The historical origin of the practice of amicus curiae is contested. There is controversy around the historical origins of this practice that has mutated in different forms than it was historically understood.¹ There are two dominant positions that seek to trace the historical origins of amicus curiae. Some scholars believe that the practice has its roots in Roman law while others attribute the practice to English common law. Mohan cautions against the importation of an 'ill-defined' concept such as amicus curiae without first appreciating its historical origins. It is on this score that it is important to appreciate its historical origins.²

Some scholars trace the origins of the practice of amicus curiae to Roman law.³ A survey of the literature on the controversy of the origin of the practice of amicus curiae reveals that this

¹ O Jonas 'The participation of amicus curiae in the African human rights system' (PhD thesis, University of Bristol Law School 2019) 57.

² S Chandra Mohan 'The Amicus Curiae: Friends No More' (2010) *Singapore J of Legal Studies* 352.

³ I Izarova, B Szolc-Nartowski & A Kavtun 'Amicus Curiae: Origin, Worldwide Experience and Suggestions for East European Countries' (2019) 60(1) *Hungarian J of Legal Studies* 18, 20. See also O Jonas 'The Participation of the Amicus Curiae Institution in Human Rights Litigation in Botswana and South Africa: A Tale of Two Jurisdictions' (2015) 59(2) *J of African Law* 329, 333.

is the dominant theory by legal scholars and commentators⁴. Under Roman law, a judge was empowered to appoint a consilium magistratum or experts to assist the court on questions of law. These judge-appointed consilium were expected to know the law and perform an advisory role. Izarova, Szolc-Nartowski and Kavtun are in agreement that the practice of amicus curiae has Roman law roots. They however denounce what they characterise as 'the quoting problem' in an attempt to trace the historical origin of amicus curiae. They posit that 'the claims about Roman origins of amicus curiae are variously invoked, usually by quoting authors' views rather than by direct reference to the original Roman legal/literary sources'.⁵ They proceed to advise that 'the Latin term amicus curiae is no proof of the Roman origins of the institution itself'.⁶

There is however a body of literature which refutes the origin of amicus curiae to Roman law and attributes its origin to the English common law.⁷ Scholars such as Krislov posit that the practice of amicus curiae began to feature in English law reports as far back as the seventeenth and eighteenth centuries.⁸ The observation by Krislov and others who attribute the origins of the amicus curiae to the common law is not helpful in resolving, with certainty, the origins of this practice. Further, the proponents of this position have, thus far, not offered convincing justification for attributing the practice of amicus curiae to the English common law. Instead, they attempt to contrast the modern day practice to the traditional practice of amicus curiae to discount the Roman ancestry of the practice.⁹ Such an approach is erroneous as it ignores the flexibility and adaptation of the practice in the modern day era. Other scholars are of the view that the practice became part of the English common law as a 'legal transplant'.¹⁰

Izarova, Szolc-Nartowski and Kavtun posits that 'historically, amicus briefs did not appear in civil law jurisdictions'.¹¹ There is consensus in the literature that the practice of amicus curiae was grafted into civil law jurisdictions through the influence of 'globalization of procedural law'.¹² The practice of amicus curiae is a 'domesticated' concept in civil law systems. Other scholars such as Kochevar corroborate this assertion by stating that 'historically, amicus briefs did not appear in modern civil law jurisdictions'.¹³

Various theoretical perspectives and justifications have been advanced for amicus curiae participation.¹⁴ Viljoen and Abebe state that 'amicus offers assistance to a court as a neutral, disinterested or unconcerned bystander to help the court arrive at the most appropriate decision'.¹⁵ By this perspective, an amicus curiae is viewed as a benevolent information provider of crucial, scarce and relevant information to a court. In litigation, courts often rely on pleadings filed by antagonistic parties who have a position to defend and rights to vindicate. Civil society organisations and other experts may fill this information gap by using the amicus curiae procedure. Amicus curiae participation therefore plays a pivotal role to bridge any information gap that the court and the parties to litigation may have to achieve the primary objective of the court – to administer justice.

⁴ Jonas 'The Participation of the Amicus Curiae Institution in Human Rights Litigation in Botswana and South Africa' (note 3 above) 333.

⁵ Izarova, Szolc-Nartowski & Kavtun (note 3 above) 20.

⁶ Ibid 19.

⁷ See L Epstein 'A comparative analysis of the evolution, rules and usage of amicus briefs in the US Supreme Court and in state courts of last resort' (A paper prepared for delivery at the 1989 meeting of the Southwest political science association, Little Rock, Arkansas 1989) 3.

⁸ S Krislov 'The Amicus Curiae Brief: From Friendship To Advocacy' (1963) 72 The Yale LJ 694, 695.

⁹ See FM Covey Jr 'Amicus Curiae: Friend of the Court' (1959) 9(1) DePaul LR 30, 34.

¹⁰ See F Pommersheim 'Amicus briefs in Indian law: the case of Plains Commerce Bank v Long Family Land & Cattle Co' (2011) 56 South Dakota LR 86, 87.

¹¹ Izarova, Szolc-Nartowski & Kavtun (note 3 above) 28.

¹² Ibid.

¹³ S Kochevar 'Amicus Curiae in Civil Law Jurisdictions' (2013) 122 The Yale LJ 1653, 1659.

¹⁴ See F Viljoen & AK Abebe 'Amicus curiae participation before regional human rights bodies in Africa' (2014) 58(1) J of African Law 22, 25.

¹⁵ Ibid 25. See also RJ Garcia 'A Democratic Theory of Amicus Advocacy' (2008) 35(2) Florida State Univ LR 315, 347

The informational role of amicus curiae is distinct from that of an intervening party. An intervening party participates in litigation as of right by virtue of its direct and substantial interest in the proceedings and its outcome while amicus curiae participation falls within the purview of a court's discretion.¹⁶ Although in some jurisdictions an amicus curiae must have an interest in the proceedings, such an interest is dependent on what the amicus curiae offers to the court and whether its admission will assist the court in resolving novel and complex issues. From the above, it is clear that the role of amicus curiae is not only unique but also complex to discharge. Posner J correctly observed that for an amicus curiae to be admitted, they must offer 'a unique perspective beyond that of the parties and their lawyers'.¹⁷

Another theoretical justification for amicus curiae participation is the need to democratise judicial processes and outcomes. Garcia declares that 'amicus participation can be viewed from a number of different democratic perspectives, including participatory democracy, popular constitutionalism and deliberate democracy'.¹⁸ He makes this observation with regard to amicus participation playing a democratic role in judicial processes: 'Perhaps the best argument for liberal standards for the filing of amicus briefs is the argument for making the courts a forum for discussion in a democratic system ... amicus participation has provided needed cues and support to social movements and has given social movements a stake in the rule of law'.¹⁹

Further, amicus curiae intervention is an opportunity to develop law and jurisprudence.²⁰ Amicus curiae participation is a radical departure from the traditional approach to litigation where two adversarial parties appear before a court and solely relies on the court to resolve the legal impasse. It avails an opportunity for NGOs to provide guidance to the court which can facilitate development of progressive jurisprudence in women's rights and sexual rights.

4. Comparative Perspectives: Overview of Chapters

This edited volume includes comparative perspectives of amicus curiae practices from seven African countries: Kenya, Botswana, Uganda, Malawi, Nigeria, Burkina Faso and South Africa. The country chapters discuss the history and evolution of amicus curiae practices in each country context, the legal frameworks that govern amicus curiae rules in these contexts, examples of cases where courts have pronounced themselves on amicus curiae and what have those outcomes been, as well as gaps and opportunities for improvement in the law and practice of amicus curiae.

The Kenya chapter shows how the practice of amicus curiae evolved from playing a minimal, sometimes controversial, role in court proceedings, to being embraced in the radical transformation of the judiciary in Kenya post the 2010 constitutional regime, where the friend of court is now seen as a key participant in complex legal disputes and public interest cases. The authors elaborately discuss the statutory and legal basis for amicus curiae in Kenya at different levels of courts, the tests that courts have developed to determine the participation of amicus curiae and the range of different persons usually admitted as amicus curiae. This chapter further flags the persisting areas of contestation such as the difficult balance between satisfying

¹⁶ See *Hoffmann v South African Airways* [2001] ZACC 17 para 63, where the court stated 'Amicus Curiae assist the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position'.

¹⁷ See *Ryan v Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

¹⁸ Garcia (note 15 above) 347.

¹⁹ Ibid 346.

²⁰ Jonas 'The Participation of the Amicus Curiae Institution in Human Rights Litigation in Botswana and South Africa' (note 3 above) 339.

requirements for neutrality and (perceptions of) bias, questions of cost for or against amicus curiae, and the difficulties of measuring how and to what extent amicus curiae interventions contribute to development of jurisprudence.

The Botswana chapter raises important considerations about the practice of amicus curiae in a jurisdiction which, to a large extent, has not codified rules or principles governing amicus curiae participation. We also see how courts have used common law and applied principles such as 'the usefulness test' in determining whether to admit amicus curiae or not. Using case law, this chapter gives examples of instances where amicus curiae intervention has had positive impact(s) and where it has been misused. The authors demonstrate that the lack of a clear framework to regulate amicus curiae participation and its role in local courts is problematic due to a lack of certainty and standardisation of the practice. Ultimately the chapter invites us to consider the cost and benefits of flexible rules when it comes to amicus curiae practice, cautioning us that while flexibility can lend itself to progressive or liberal applications, it can also lead to rigid applications that discourages amicus curiae participation in litigation.

The Uganda chapter relies on previous existing analyses to show how Ugandan courts have moved from a conservative approach which made amicus curiae uncommon to a steady increase in amicus curiae practice post the 1995 Constitution. The author then goes further to explore the recent attempt to codify amicus curiae procedures through the draft 2021 Judicature (Amicus Curiae) Rules. She juxtaposes the impending clear parameters for admitting amicus curiae articulated under these draft rules, with court decisions that have had a significant impact on the law and practice on amicus curiae in Uganda, most notably, the *Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others*²¹ which was the first time the court exhaustively stated criteria for admitting amicus curiae. She emphasises the importance of codifying amicus curiae principles under domestic legislation in order to foster uniformity, consistency and transparency. This chapter demonstrates a significant learning from the Uganda context which is that courts have impact, and case law can be a powerful way of initiating change and charting legal direction for a nation.

The Malawi chapter explores how the High Court in Malawi started receiving an increased number of amicus curiae applications post the adoption of the 1994 Constitution, as the judiciary became more independent. This author highlights rules for an application to be admitted as amicus curiae in Malawi such as the need to describe the interest of the amicus curiae in the proceedings, the relevance of the amicus curiae to the proceedings and the reasons for believing that the arguments will be useful to the court. The author also grapples with the principle that amicus curiae should be non-partisan, yet most amicus curiae are non-governmental organisations that have an interest in the protection of human rights and are therefore likely to have arguments in their briefs to protect that interest. She concludes that there is room for courts in Malawi to embrace a more flexible, adaptable and progressive approach where information offered by the amicus curiae is not considered as bystanders' contributions but rather be perceived as potential contribution to development of jurisprudence.

The Nigeria chapter shows that despite the lack of substantive law or procedural rules regulating amicus curiae in Nigeria, courts have been more receptive to amicus curiae that are specifically invited by the courts to participate in proceedings. Amicus curiae intervention has mainly been used by the Supreme Court which is the highest court and whose decisions are binding on all other courts. The main challenge highlighted is that while there are instances when courts have admitted amicus curiae in cases on women's rights and sexual rights, and while courts will often acknowledge the submissions of the amicus curiae, these were not taken into consideration

²¹ Civil Application No 2 of 2016 [2016] UGSC 2.

in the judgments. The authors argue that this suggests that more credence is given to amicus curiae briefs if the submission is at the instance of specific invitation by the court and conclude that the practice and procedure of amicus in Nigeria still needs to be developed particularly in relation to women's rights.

The Burkina Faso chapter is a unique contribution to this compendium because it is a country that does not have the practice of amicus curiae. The analysis considers the utility of the amicus curiae intervention and concludes that 'Burkina Faso's lack of knowledge of amicus curiae deprives its judicial system of an invaluable tool'. The chapter uses comparative perspectives from other civil law jurisdictions, as well as regional human rights mechanisms and demonstrates that the intervention of the amicus curiae could be a good opportunity for Burkina Faso's national jurisdiction in human rights matters because such an admission would greatly contribute to developing jurisprudence capturing international and regional human rights law and its implementation in Burkina Faso.

The South Africa chapter highlights how the role of amicus curiae in South Africa evolved against the background of public-interest litigation which is largely the result of the apartheid era in which human-rights activists and civil society organisations sought to fight the inequalities of the apartheid regime. The author elaborates on the rules that guide amicus curiae practice including criteria for admission and well as what they can or cannot do. She also gives examples of landmark cases where South African courts benefitted from amicus curiae interventions especially in the area of advancing socio-economic rights as well as gender justice. The author also raises concerns that although there is a well-established practice of amicus curiae in South Africa, there also an on-going academic debate questioning whether the use of this intervention can lead to real social change. She suggests that there is a need for public interest organisations, when intervening as amicus curiae in future, to bolster their submissions and assist the court with finding the most appropriate and substantive remedies such as the use of the structural interdict in socio-economic rights cases. The examples given also show that even where amicus curiae participation is rejected, the mere legal participation and activation done by organisations, coupled with advocacy and a media campaign, can still lead to impactful results.

CHAPTER 2: Friend of the Court: Practices by Kenyan Courts in Enriching Jurisprudence Through the Amicus Procedure

Emily Kinama, Isabella Mwangi, Vivian Mwende Wambua and Valentine Nyokabi Njogu

1. Introduction

The acceptance of the concept of *amicus curiae* as part of the judicial system of determining cases dates back to several centuries. Its origins are traceable to Roman law.²² The term *amicus curiae* as originally used meant friend of the court, a definition maintained to date.²³

2. Historical Context of Amicus Curiae: Pre and Post Constitution of Kenya, 2010

2.1. Pre-Constitution of Kenya, 2010

Kenya, as a common law system, has historically used an adversarial tradition in determining cases placed before it.²⁴ Judges were to make decisions based on the representation by the parties, their analysis of that evidence and application of relevant law. However, judges have a slightly larger role than this. They are expected to also carry out their own research and analysis. In public interest cases, it also soon became clear that decisions would not just examine the rights of private parties before the courts. On the contrary, most public interest cases affected a wide spectrum of the population.²⁵ *Amicus curiae* played a minimal, and sometimes controversial, role in Kenyan court proceedings. The procedure used at the time was that the court invited the Attorney General and other government representatives to assist the court whose function would often be muddled. The government counsel would at times appear on behalf of an interested party and as an *amicus curiae*.²⁶ It is for this reason that the court's original traditional position of litigation started changing.

In the early 2000s, courts in Kenya started admitting public-spirited citizens especially in matters that had a public angle. This was more apparent in cases of human rights, land, environment and gender. Eventually, the court justified relaxation of the traditional rule of *locus standi* based on personal injury preoperatory interest in favour of public spirit and interest.²⁷ This position was specifically intended to remedy strict rules of standing, but it marked a time when courts became more open to recognising that different parties could play different roles in public interest litigation and human rights cases. While this case was among several others that brought a progressive approach before the promulgation of the Constitution in 2010, it was not based on a supportive constitutional foundation or statutory rules.

²² S Krislov 'The Amicus Curiae Brief: From Friendship To Advocacy' (1963) 72 The Yale LJ 694.

²³ B Vaughan Abbott *Dictionary of Terms and Phrases Used in American or English Jurisprudence* (2013) defines the term a friend of the court to mean a bystander who, without having an interest in the cause, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge'.

²⁴ C Odote & L Musumba *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Election in Kenya and the Emerging Jurisprudence* (2016) ch IX.

²⁵ OM Benson Ochieng & C Odote 'Challenges and Prospects for Public Interest Environmental Litigation in Kenya' (2007) 13.

²⁶ *In Re Law Society of Kenya* [1998] High Court Misc Civ App 141 of 1998 [1998] eKLR.

²⁷ *Kenya Bankers Association and others v Minister of Finance and Another* (2002) 1 KLR 61.

2.2. Post Constitution of Kenya, 2010 and entrenchment of the friend of the court in the law

Since the promulgation of the Constitution of Kenya, 2010 (the Constitution), courts in Kenya have embraced the friend of the court as a key participant in complex legal disputes or those cases whose determination will affect the broader rights of the public. This is a radical transformation for the Kenyan judiciary, whose hostility to the friend of the court in previous decades bordered on the illiberal.²⁸ Reimagining the friend of the court, however, poses two problems for Kenya. The first is conceptual because the friend of the court must always be defined in context of the jurisdiction in which it is used, the courts must first determine what friend of the court really means in Kenya. Second, the Kenyan judiciary is faced with a practical problem on how to implement the right to friend of the court participation in a way that respects the important role it plays in the judicial process but does not infringe on the rights of litigants and does not overwhelm the courts.²⁹

The Constitution provides for access to justice for all persons and requires purposive and wide application and interpretation of the Bill of Rights so as to 'promote, the spirit, purport and objects of the Bill of Rights'.³⁰ In addition, courts are required to avoid over-reliance on technicalities as a bar to access to justice,³¹ and, specifically in relation to public interest litigation, provide for 'any person' to institute proceedings in court seeking relief for the violation, or even threatened violation, of the Bill of Rights. The Constitution consequently seeks to provide space for fair, objective and inclusive decision-making and opportunity for anybody desirous of ventilating a matter before the courts to do so subject to adherence to the rules set.

Article 259 sets out the rules of interpretation, stating that the Constitution should be interpreted in a way that 'promotes its purposes, values, and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance'.³²

The Constitution has elevated the role of a friend of the court to determine complex legal disputes. Under art 22(3)(e), the Constitution empowers the Chief Justice to make rules relating to the enforcement of the Bill of Rights satisfying the criteria, among other things, that 'an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court'.

These rules, known as the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules), were developed by the retired Chief Justice Willy Mutunga. Rule 2 defines a friend of the court as 'an independent and impartial expert on an issue which is the subject matter of proceedings but is not a party to the case and serves to benefit the court with their expertise'. In addition, rule 6 provides the procedure upon which the High Court can admit such a party. An impartial expert joins the case to assist with an issue which the parties have raised. At the High Court, a potential amicus curiae may make an oral application or a written one, and in some cases, the court may admit a party as an amicus curiae on its motion.

Courts in Kenya have, since the promulgation of the Constitution in 2010, increased the number of persons admitted as amicus curiae to aid the court in reaching a just determination of cases.

²⁸ C Kerkering & C Mbariza (eds) 'Friend of the Court & The 2010 Constitution: The Kenyan Experience and Comparative State Practice on Amicus Curiae' (2017).

²⁹ Ibid.

³⁰ Constitution of Kenya, 2010 art 20(4)(b).

³¹ Ibid art 159(2)(d).

³² Ibid art 259(1)(a)-(d).

The range of different persons admitted as amicus curiae include legal experts, United Nations Special Rapporteurs and technical experts. The Constitution is complete with its mode of its interpretation and its various articles achieve this collective purpose. It is in interpreting the Constitution that Kenya's robust, patriotic, progressive and indigenous jurisprudence will be nurtured, grown to maturity, exported and can become a beacon to other progressive national, African, regional and global jurisprudence.³³

In practice, the courts have adopted a three-fold rule to determine the participation of amicus curiae in a case. This includes neutrality of the intended amicus curiae, its provided expertise and whether admission would serve the public interest. This test, initially developed in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others*³⁴ where the court noted responsibility set on the court under the Constitution to receive well informed inputs which would enhance access to justice and enable it to make positive jurisprudence, is applied in varying degrees in the courts in Kenya.

In determining whether amicus curiae is partisan, the test should be 'that of the ordinary litigant, rather than a legal expert examining the dichotomy between factual matter and legal matter'.³⁵ An amicus curiae, however, should not be considered partisan merely because its expert analysis disfavours the outcome sought by one of the litigants. After all, an expert's analysis will often favour one argument over another. The critical question is whether the expert analysis of the merits consideration will support the court to arrive at a determination. If the research is partisan and not supported by expertise, the court is free to deny admission of the party as amicus curiae.

3. The Statutory and Legal Foundation for Admission of the Amicus Curiae

Article 20(3) as read with art 22(3)(e) of the Constitution form the constitutional basis for the admission of amicus curiae to court disputes. Article 20 enjoins courts to ensure that the law is interpreted and developed in a manner that ensures the enforcement of human rights, while art 22(3)(e) allows for the participation of an organisation or individual as an amicus curiae with the leave of the court in all cases claiming a violation of rights or fundamental freedoms guaranteed under the Bill of Rights. The court interpreted this article in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* stating that this article is 'the very foundation for well-informed inputs before the Court, which inherently, justifies the admission of amici curiae'.³⁶ The court noted that it has a duty to ensure that decisions enhances the right to access justice and open up positive lines of development in jurisprudence, to serve the judicial system within the terms of the Constitution.³⁷ Courts in Kenya therefore have an inherent right to admit amicus curiae as long as the issue before them concerns the question of violation of the rights or fundamental freedoms in the Bill of Rights.

3.1. The magistrates' courts

While the magistrates' courts only have jurisdiction to apply the Constitution, a reading of the above constitutional provisions demonstrates that such courts can allow participation of amicus curiae. Proceedings before these courts are governed by the Magistrates' Court Act and there are no separate rules. In March 2022, the Principal Magistrate at Rongo in *Francis Edward Otieno*

³³ *Re the Principle of Gender Representation in the National Assembly and the Senate* [2012] Supreme Court Adv Op App 2 of 2012 [2012] eKLR 38 (Mutunga CJ dissenting).

³⁴ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* (Petition 12 of 2013) [2015] eKLR 41.

³⁵ Ibid 16.

³⁶ Ibid 21.

³⁷ Ibid.

v Jared Agawa Ochieng and Another,³⁸ admitted the Initiative for Strategic Litigation in Africa as amicus curiae in a matter before it. Although the matter was settled out of court, it marks an important step towards recognition that magistrates' courts can benefit from participation of amicus curiae as they apply human rights standards in matters before them.

3.2. The High Court

In Kenya, there are different laws and rules that govern the functions of the High Court and the specialised courts, the Court of Appeal and the Supreme Court. The rules are more specific as they provide for the procedures to be followed for admission of parties as amicus curiae. The High Court is the first point upon which parties can seek relief for violations or threats to violations of the Bill of Rights.³⁹

At the High Court, parties approaching the High Court are to adhere to both art 22 of the Constitution as well as the Mutunga Rules. These provide that the court may allow any person with expertise in a particular issue which is before the court to be admitted as a friend of the court.⁴⁰ The word 'may' in this provision speaks to the discretionary powers of the court to allow or disallow persons from being admitted as an amicus curiae. In addition, it also provides that leave to appear as a friend of the court may be granted if the person applies orally in court or in writing.⁴¹ While the text of the Mutunga Rules speaks to allowing an oral application to join as party as amicus curiae, courts have progressively restricted this rule in line with *Francis Karoki Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* where the court stated that admission of parties must be through an application in writing.⁴² In *Winfred Clarkson Otieno Ochieng & 12 Others v the Cabinet Secretary, Ministry of Health & 9 Others (Interested Parties); Kenya Legal and Ethical Issues Network on HIV and Aids (Amicus Curiae)*,⁴³ the court stated that an application for joinder as amicus curiae which was not accompanied by an amicus brief would lack legal standing. The court however affirmed the power and discretion of the court under rules 3 and 6(c) which allow the court, on its own motion, to exercise its discretion and admit a party as an amicus curiae. This approach has been taken in various other matters where the High Court has made a call out for parties to join as an amicus curiae.⁴⁴

3.3. Court of Appeal

The Court of Appeal Rules, 2010 do not provide for admission of amicus curiae. The lack of rules in the court in relation to the participation of amicus curiae has sparked confusion. In some cases, the practice that has been experienced at the Court of Appeal is that where a party was admitted as an amicus curiae at the superior court (High Court, Environmental and Land Court or the Employment and Labour Relations Court), then on appeal they would be listed as a respondent and would participated in the proceedings as such.

In 2021, in *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae)*,⁴⁵ Professor Migai Aketch filed an application to be joined as an amicus curiae and relied on ss 3, 3A and 3B of the Appellate Jurisdiction Act and rules 42, 43 and 47 of the Court of Appeal Rules, 2010. These

³⁸ Civil Suit No E013 of 2022.

³⁹ Constitution (note 30 above) art 165(3)(b).

⁴⁰ Mutunga Rules rule 6(a).

⁴¹ Mutunga Rules rule 6(b).

⁴² Petition No 15 & 16 (consolidated) of 2015 [2021] eKLR.

⁴³ Constitutional Petition No E500 of 2021 (consolidated with Petition Nos E505 of 2021, E518 of 2021, E520 of 2021 and E27 of 2021) [2022] eKLR.

⁴⁴ For example in *Solomon Ngatia & Others v The ODPP & Others* (Petition E002 of 2021) the court invited Katiba Institute to be joined as amicus curiae and later admitted Kenya Legal and Ethical Issues Network (KELIN) and Women Link Worldwide as joint amici curiae.

⁴⁵ [2021] eKLR (the BBI Court of Appeal Judgment).

provisions are the general provisions indicating the jurisdiction of the Court of Appeal and are not specific to the admission of amicus curiae. The amicus curiae was admitted in the case. In that case, there were therefore parties who had played an initial role as amicus curiae and who had been listed as respondents, while others had participated as amicus curiae having been admitted at the appellate level. Gatembu JA indicated that it is irregular for the appellants to list any party who had participated as amicus as respondents, since they are considered as 'advisors to the court' and not respondents.⁴⁶

This is not always the approach the court has taken. In *FIDA Kenya v Attorney General of Kenya*, the party who was an amicus curiae was constrained to make an application before the Court of Appeal in order to continue participation in the proceedings.⁴⁷ Before the High Court, the petitioner had argued that a section in the Matrimonial Property Act which requires spouses to prove contribution prior to being awarded a share of matrimonial property at dissolution of marriage was unconstitutional. The Initiative for Strategic Litigation in Africa had been admitted as amicus curiae and provided information to the court on how requiring that parties prove contribution would ultimately disenfranchise women. That petition was unsuccessful and the petitioner filed an appeal before the Court of Appeal. The application for joinder as amicus curiae at the Court of Appeal is still pending despite the fact that it was filed in November 2018.

From the practice of the court, it is presumed that it has the inherent power, based on art 22(3) of the Constitution, to admit any party to play the role of friend of the court. This position will change in August 2022 after the Court of Appeal Rules, 2022 come into force. These rules make reference to an amicus curiae being admitted to the court to address it on questions of law.⁴⁸ However, as question of enhanced access to justice, it would be helpful if the Court of Appeal has rules that expressly provide for admission of amicus curiae to the court to avoid parties listing the already admitted amicus curiae as respondents. It would also give clarity to parties who may be in a position to provide information to the court. This is particularly urgent in view of the fact that the Court of Appeal is the apex court in a myriad of matters relating to human rights.

3.4. The Supreme Court

In 2020, the Supreme Court enacted new rules that enhanced the procedure for admission of amicus curiae. The critical rules include that the court must consider three main aspects before admitting a person as an amicus curiae, 'a. proven expertise of the person. b. independence and impartiality of the person; or c. the public interest'. This provision is derived from the previous court decisions on amicus curiae on expertise, neutrality and independence.⁴⁹ However, the court severely limited the time within which a potential amicus curiae should apply to be enjoined in the proceedings.

Rule 19(4) of the Supreme Court Rules, 2020 (Supreme Court Rules) provides that '[a]n application to be admitted as an amicus or a friend of the Court shall be done within 7 days upon filing of a response in any proceedings before the Court'. This provision has stringent timelines that will prove problematic in future cases that might be filed at the Supreme Court. There are cases which are filed at the Supreme Court that have gone through the rank of courts as a case which is private in nature but over time meets the criteria of being a case which raises issues of general public importance and is certified as such by the Supreme Court. Currently, the Supreme Court has no electronic system within which the general public can have access to the cases that have

⁴⁶ Ibid Gatembu JA's judgment para 192.

⁴⁷ Petition 164B of 2016 [2018] eKLR.

⁴⁸ Published in Kenya Gazette Supplement No 41 of Legislative Supplement No 21.

⁴⁹ Supreme Court Rules, 2020 rule 19(2)(a) to (c).

been filed and the resultant responses that have been filed in such cases. This raises a practical problem where persons who seek to apply to be amicus curiae are not aware of crucial cases which they may seek to join as amicus curiae thereby risking being locked out by the court from offering expertise in specific matters.

3.5. The practice before the courts

3.5.1. *Neutrality and bias versus proven expertise*

While in other jurisdictions it is required that amicus curiae have an interest in the outcome of the matter, in Kenya, a bona fide interest means that an amicus curiae is neutral and has fidelity to the law.⁵⁰ Although an amicus curiae may have an interest in a specific case, it must enter the proceedings on a foundation of neutrality on which litigants should prevail. This means that in Kenya amicus curiae should be neutral and aid the court in making a just determination of the case, whilst in other countries amicus curiae can have a specific position.

The Supreme Court Rules and rule 2 of the Mutunga Rules require the amicus curiae to be an independent and impartial expert on an issue which is the subject matter of proceedings. This has been echoed in the *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* where the Supreme Court reiterated that:

the direction of amicus intervention, ought to be governed by the principle of neutrality, and fidelity to the law and ... [W]here, in adversarial proceedings, parties allege that a proposed amicus curiae is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see: *Raila Odinga & Others v. IEBC & Others*; S.C. Petition No. 5 of 2013-Katiba Institute's application to appear as amicus).⁵¹

Justice Philip K Tunoi & another v Judicial Service Commission & 2 others held that an amicus curiae should not show any perception of bias and partisanship in their conduct prior to making the application to be joined as amicus curiae, in their application or documents filed or written submissions. The court also emphasised that the party should exercise neutrality.⁵²

One issue that arises with regards to an amicus curiae and the issue of neutrality is that in some instances an expert, for example, has written on a specific area and has developed arguments that may seem partisan. In such an instance, although the applicant could be the leading expert in the field they could be classified as being biased. However, in *Independent Electoral and Boundaries Commission & 4 others v David Ndii & 82 others; Kenya Human Rights Commission & 4 others (Amicus Curiae)*, Musinga JA clarified this issue when he held that an amicus curiae should not be considered partisan just because his expertise may seem favourable to one party in an adversarial case.⁵³ The court must instead consider that the conclusions made by the amicus curiae is based in expert analysis of the issues in dispute.⁵⁴ In response to a ground of appeal that the High Court admitted amicus curiae who were partisan, Gatembu JA held that the appellants ought to have challenged the earlier directions of the High Court allowing to admit the amicus curiae and not raise it later after the judgment was rendered.⁵⁵

⁵⁰ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* (note 34 above) para 41.

⁵¹ *Ibid.*

⁵² [2014] eKLR para 38.

⁵³ [2021] eKLR para 493.

⁵⁴ *Ibid.*

⁵⁵ *Ibid* Gatembu JA's judgment para 191.

In determining whether an intended amicus curiae is partisan or not, the court considers the responses by the parties to litigation as well as the proposed intervention in the case. In some cases, the court has then determined that an intended amicus curiae would be admitted as an interested party or vice versa.⁵⁶

3.5.2. Restriction of amicus curiae participation

In some instances, the courts have also restricted the participation of admitted amicus curiae when determining its participation. When dealing with amicus curiae at the Supreme Court in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*, the court asserted its power to restrict the scope of the amicus curiae briefs. Considering the application of Law Society of Kenya where it had outlined two questions of law in its brief, the Supreme Court limited this to only one question of law which they narrowed,⁵⁷ whereas in the admission of the Attorney General as amicus curiae the court expunged one issue of law from the amicus brief that the Attorney General had presented.⁵⁸

The Supreme Court has also showed its restriction on the participation of the amicus curiae where it admitted several amicus curiae but directed that they will not be allowed to present oral submissions before the court.⁵⁹ The practice of restricting amicus curiae from making oral submissions and limiting their participation to written submissions was also made where all parties who were enjoined in the case of *Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto and Others* were restricted to written submissions.⁶⁰

In cases which are complicated and raise complex issues of law, it is critical for the participation of amicus curiae in presenting oral submissions. Although the Supreme Court has stated that admission as an amicus curiae is a privilege and not a right,⁶¹ and it has also used its discretion to restrict amici curiae especially in instances where many of them have been admitted in a case, the essence of an amicus curiae risks being watered down because the court risks making determinations where they could have questioned amicus curiae further to clarify points of law.

3.6. The question of costs for or against amicus curiae

In *Mumo Matemo*,⁶² the Supreme Court held that interested parties and amicus curiae are not subject to costs orders. The new Supreme Court Rules are also unique because it is currently the only law that provides that if the court on its own motion appoints a friend of the court and the amicus curiae incurs fees or expenses then such expenses will be paid out of the Judiciary Fund in accordance with a scale determined by the President.⁶³ It is not clear as to whether the President of the Supreme Court has developed any scale for determining such amounts that can cater for the expenses.

The Court of Appeal and the High Court have no rules that are like rule 19(3) of the Supreme Court Rules. In the case of *Martin Maina t/a Maina & Maina Advocates v Violet Barasa t/a Violet*

⁵⁶ As was the case in the court's determination in *Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto & Others* SC Application No 11 of 2020 ruling dated 16 July 2021.

⁵⁷ [2017] eKLR. The court held that it reserves the right to direct the amicus on how to proceed, 'we direct that the Society restricts its submissions on the single issue contained in its brief, particularly: the rightful interpretation of section 83 of the Elections Act in relation to the Constitution 2010'.

⁵⁸ While admitting the attorney general as an amicus at para 19 the court made an order expunging a portion of the draft amicus brief.

⁵⁹ *Attorney General v Ndii & 73 others; Dixon & 2 others (Amici curiae)* (Petition E016 of 2021) [2021] KESC 19 (KLR) (Civ) ruling dated 9 November 2021 para 9.

⁶⁰ Note 56 above para 23.

⁶¹ Ibid para 22.

⁶² *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* (note 34 above) para 41.

⁶³ Supreme Court Rules (note 49 above) rule 19(3). This also presents a challenge since the Judiciary Fund has not been operationalised.

Barasa & Company Advocates; Law Society of Kenya (Amicus Curiae), an issue arose where the court had stated that the amicus curiae who had been invited by the court on its own motion was to be paid costs in the suit by the party that lost the case.⁶⁴ An application for review of this decision was filed in which the applicant stated that the Supreme Court in the *Mumo Matemo* case had already determined that amicus curiae should not be paid costs and thus argued that the judiciary should bear the costs of the amicus curiae and not the party that lost the case. However, the court, in a ruling which was delivered on 17 November 2019, prior to the enactment of the Supreme Court Rules, held that the legal position is that the trial court has the discretion to award costs and that another court cannot interfere with such discretion unless it was based in the wrong principles or such discretion was not exercised in a judicious manner.⁶⁵ This judgment that awarded costs to the amicus curiae was given without due regard to the Supreme Court judgment in *Mumo Matemo* which was delivered four years earlier and which held that '[a]n amicus curiae is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as amicus, the legal expenses may be borne by the Judiciary'.⁶⁶

Moving forward and to avoid confusion, it is critical that the other courts follow the Supreme Court with respect to the Judiciary Fund providing costs for amicus curiae which have been invited by the court to assist it with its expertise to determine critical questions of law.

4. The Contribution and Future of Amicus Curiae

Amicus briefs have played an increasingly active role in supplying information to the court which have been used to build jurisprudence in various issues of law, particularly in cases dealing with women's rights. However, an analysis of these decisions demonstrates that although the cases raised matters of great public interest, some of the judgments do not highlight the contribution of the amicus curiae.

In *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*, the court adopted the submissions made by the amicus curiae on the issue of structural remedies and appropriate relief, further to hold that the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, to redress the violations of human rights.⁶⁷ Similarly, in *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*, the High Court of Kenya admitted two sets of amici curiae: Katiba Institute as the first amicus curiae and KELIN and ISLA as the second joint amici curiae.⁶⁸ The court observed that the submissions of the amici curiae touched on how the court should balance the various rights in issue and make a finding whether the limitations imposed by the impugned act were reasonable and justifiable due to the harmful nature of female genital mutilation. The written submissions also emphasised the state's obligations under the Constitution and international law to protect individuals' human rights. The amici curiae also made submissions that consent is immaterial in the case of a harmful cultural practice and the state has the responsibility to regulate such conduct. However, the judgment did not specify which amicus curiae submitted on which issue and following an analysis of the judgment it can be concluded that the issues mentioned as highlighted by the court as the amici curiae's submissions contributed to the judgment. It must be noted in a case like this where there were over ten interested parties the issues of law discussed by the amici curiae as well as the interested parties were overlapping or repeated in some instances because the facts were the same.

⁶⁴ [2019] eKLR.

⁶⁵ Ibid para 14.

⁶⁶ Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others (note 34 above) para 41.

⁶⁷ [2021] eKLR.

⁶⁸ [2021] eKLR.

In the *Matter of the Principle of Gender Representation in the National Assembly and the Senate*, the state sought an advisory opinion on the proper time for the implementation of the gender rule in the Constitution which requires that no more than two-thirds of persons elected into office be of one gender.⁶⁹ The Centre for Rights Education and Awareness, Katiba Institute, the Centre for Multi-party Democracy, FIDA Kenya, the Kenya Human Rights Commission (KHRC) and the International Centre for Rights and Governance were admitted as amici curiae arguing for an immediate realisation of the gender equity principle. The court, by a majority decision, arrived at the conclusion that the principle would be realised progressively. In dissent, the then Chief Justice Willy Mutunga found that given the history of Kenya and the immediacy of the matter, interpretation of the articles required a purposive approach without relying on jurisprudence based on other jurisdictions and noted that the one-third principle was just the beginning because the aim was to have 50/50 representation between men and women and that equality should not be based on the traditional equality under the law but on societal equality.⁷⁰

In the case of *Baby 'A' and Another v Attorney General and Others*,⁷¹ the court's finding was aligned to the amicus curiae (KHRC) and petitioner's opinion on discrimination, noting that while there was no actual evidence of Baby A having undergone discrimination, there was need to ensure that Baby A and other intersex children be registered by the Registrar of Births and Deaths to prevent future discrimination. Further, the court determined that 'sex', as used in s 2(a) of the Registration of Births and Deaths Act (Cap 149 Laws of Kenya), means only male or female. Although the court saw a need for a third category of sex it left that duty to be executed by the legislature. This has since been actualized and in the last census conducted in 2019, there was a category for intersex.

In *Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae)* there were three amici curiae admitted by the court, the Women's Link Worldwide, the National Gender and Equality Commission and the Kenya National Commission on Human Rights (KNCHR).⁷² Women's Link Worldwide relied on a judgment from the Inter American Court of Human Rights⁷³ to state that the right to life from conception is not absolute and cannot be used to restrict other rights disproportionately or to discriminate. It also argued that the right to life from conception does not give pre-natal life the status of a person as well as on the constitutional right to benefit from scientific progress regarding sexual and reproductive health. The National Gender and Equality Commission which is an independent constitutional commission in Kenya presented a joint report it did to argue that sexual violence imposes both direct and indirect costs on women and girls, their households and the society.⁷⁴ It also referred the court to the recent changes in law in other countries in Africa, which now provide guidance on how to ensure access to safe and legal abortion for survivors of sexual violence, and provided comparative analysis of Ethiopia which has guidelines which allow for abortion where a woman has been raped. The third amicus curiae, the KNCHR, submitted that the phrase 'if permitted by any other law' as used in art 26(4) means that a law can allow abortion based on other grounds such as s 35(3) of the Sexual Offences Act. It also submitted that the 2009 National Guidelines, although developed before the 2010 Constitution, reflect the spirit of arts 26(4), 28 and 29(d) and (f) of the Constitution.

⁶⁹ Advisory Opinion no 2 of 2012 [2012] eKLR.

⁷⁰ See the dissenting advisory opinion by Hon Willy Mutunga in *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* (note 33 above).

⁷¹ Petition no 266 of 2013 [2014] eKLR.

⁷² [2019] eKLR.

⁷³ *Artavia Murillo et al ('In Vitro Fertilization') v Costa Rica* Judgment of 28 November 2012.

⁷⁴ National Gender and Equality Commission 'Gender-Based Violence in Kenya: The Economic Burden on Survivors' (2016).

In Coalition on Violence Against Women & 11 others v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission (Interested Party); Kenya National Commission on Human Rights & 3 others (Amicus Curiae), a case involving the state's due diligence obligations in relation to sexual violence that occurred during the 2007 post-election violence, four amici curiae were admitted, the KNCHR, Katiba Institute, the Constitution & Reform Education Consortium and the Redress Trust.⁷⁵ The judgment only recognised that the amici curiae filed written submissions on diverse dates. However, it did not highlight the content of the submissions therefore it is difficult to analyse what the contribution of the amici curiae was and whether the court adopted the submissions.

Likewise, in *CK (A Child) & 11 Others v Commissioner of Police/Inspector-General of the National Police Service & 2 Others*, the KNCHR was the amicus curiae in this case concerning the state's failure to investigate and punish the defilement of minors in Meru county.⁷⁶ A reading of the judgment shows that the KNCHR filed written submissions but the court did not highlight contribution of amicus curiae in the judgment therefore it is difficult to analyse this. It however recognised that it read all the pleadings and submissions of all the parties in the case before rendering its judgment.

There lies an opportunity for amicus curiae briefs to be utilised beyond providing information on constitutional violations as courts have demonstrated appreciation of consequential and relevant issues that assist them in reaching a decision. Such information would include scope of extent of the rights available, the best way to assess damages and crafting of remedies.⁷⁷ So far, courts have taken the position that '[i]t is only with extreme caution, and in exceptional cases, that Kenyan courts will apply authorities from foreign jurisdictions about the admission of amicus curiae. It is only those aspects that the Court deems applicable in the Kenyan context will be adopted'.⁷⁸ It cannot be gainsaid however that where amicus curiae briefs are brought by parties who litigate at the regional and international level, these present an opportunity to enrich jurisprudence through cross fertilization and further develop the law on uniformity of human rights standards.

5. Conclusion

Amicus curiae briefs are used as a persuasive tool when courts rely on the factual information, cases or analytical approaches provided by an amicus rather than a party to the case. To develop effective and progressive jurisprudence, it is imperative when designing strategic interest litigation to consider the possibility of enlisting amicus curiae participation to ensure a just and wholesome determination of the dispute before the court.⁷⁹

⁷⁵ [2020] eKLR.

⁷⁶ [2012] eKLR.

⁷⁷ Kerkering & Mbariza (note 28 above).

⁷⁸ *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* (note 34 above); *Francis Karoki Muruatetu v Republic* [2016] eKLR para 53.

⁷⁹ BJ Ennis 'Effective Amicus Briefs' (1984) 33 *Cath Univ LR* 603.

CHAPTER 3: The Amicus Curiae Context, Law and Practice in Botswana

Kago Rapula Mokotedi

1. Introduction

The landmark case of *Letsweletse Motshidiemang v Attorney General*⁸⁰ has once again brought the role of amicus curiae to the fore and ignited a debate on amicus curiae participation in Botswana. The purpose of this paper is to contribute to this ongoing debate on amicus curiae participation and to assess whether such participation has a bearing on judicial outcomes and the development of jurisprudence in Botswana. Despite the controversies surrounding the precise meaning of the concept of amicus curiae,⁸¹ there is however consensus that it can be loosely translated as 'a friend of the Court'.⁸²

The paper argues that despite the limited amicus curiae participation in Botswana, there is reason to suggest that such participation in Botswana is on a steady increase, albeit with an insignificant and sporadic impact in contributing to judicial outcomes and the development of human rights jurisprudence. Further, the paper will argue that the lack of a framework to regulate amicus curiae participation and its role in local courts is problematic and potentially discourages amicus curiae participation in litigation. Despite this observation, solace may be drawn from the embracing attitude displayed by the courts towards amicus curiae participation, especially in public interest and human rights litigation.

2. The History and Evolution of Amicus Curiae Participation in Botswana

Botswana has an adversarial legal system. As such it is important to ascertain the role and parameters of an amicus curiae in such a system. In order to demystify amicus curiae participation and its impact in judicial outcomes in Botswana, it is therefore imperative to understand the role of amicus curiae in the judicial process. The role of amicus curiae has evolved with time, both at the local and international spheres. The role of amicus curiae has not escaped judicial scrutiny in Botswana.⁸³ Botswana has a dual legal system comprising of the Roman Dutch law and customary law.⁸⁴ In terms of the hierarchy of courts, Botswana has the Court of Appeal at the apex, followed by the High Court, Industrial Court, magistrates' courts as well as the customary courts. The practice of amicus curiae participation is prevalent in the High Court in public interest litigation and constitutional matters. A survey of the judgments of both the High Court and Court of Appeal show no evidence of amicus curiae participation in private and commercial matters. This is despite the fact that in other jurisdictions amicus curiae participation has evolved to extend to a wide scope of disputes and fields of law.⁸⁵ Kirby JP summed up Botswana's legal position prior to the promulgation of the Court of Appeal Rules⁸⁶ which provides for amicus curiae participation in the apex court. He stated:

⁸⁰ Case Number MAHGB-000591/16 (unreported).

⁸¹ J Bellhouse & A Lavers 'The modern amicus curiae: a role in arbitration?' (2004) 23 Civil Justice Quarterly 187.

⁸² S Krislov 'The Amicus Curiae Brief: From Friendship To Advocacy' (1963) 72 The Yale LJ 694.

⁸³ See *Good v The Attorney General* (2) (2005) 2 BLR 337 (CA); *Ditswanelo & Others v The Attorney General and Another* (1999) 2 BLR 56 (HC); *Kewagamang & Others v Acting Officer Commanding No. 3 District & Others* (2016) 2 BLR 82 (HC).

⁸⁴ B Othlogile 'Criminal justice and the problems of a dual legal system in Botswana' (1993) 4(3) *Criminal Law Forum* 521.

⁸⁵ See S Farber 'The Amicus Curiae Phenomenon – Theory, Causes and Meanings' (2019) 29(1) *Transnational Law & Contemporary Problems* 1.

⁸⁶ See s 16 of the Court of Appeal Act, 1972, Cap 04:01, which empowers the President of the Court of Appeal to make rules of court regulating the practice and procedure of the Court of Appeal. In exercise of these powers, the Court of Appeal Rules were promulgated <<https://botswanalaws.com/subsidiary-legislation/court-of-appeal-subsidiary-legislation>>.

In jurisdictions such as England and South Africa, the rules of court lay down conditions for the intervention of a friend of the court. At present we have no such rules and are guided by precedent and the common law. Generally, however, an interested party may be permitted to intervene by filing a brief with the consent of the parties, or where one of them objects, by leave of the court, which will only be granted if the amicus has some special expertise useful to the court, or has something new to add. It will not be granted to an applicant who merely wishes to join the fray on the side of one or other parties as an antagonist.⁸⁷

Botswana has since taken steps to correct this anomaly, albeit insufficient ones as amicus curiae participation has only been provided for in the Court of Appeal Rules, to the exclusion of the magistrates' courts, High Court and the Industrial Court. It is difficult to justify this stunted approach by the judiciary in developing an amicus curiae procedure only for the apex court whilst other superior courts have been excluded.

2.1. The Rules of the High Court

Court rules play a significant role in the administration of justice by setting out practice procedures for the conduct of litigation.⁸⁸ In the *Murima* case,⁸⁹ the Court of Appeal correctly characterised the role of court rules and stated: 'Though the rules of Court are designed to facilitate the orderly and expeditious conduct of litigation, they are not to be viewed as snares for the unwary, or as barbed defences upon which a litigant will find himself impaled if he is not in strict or timely compliance with their provisions. The overriding objective of the rules is that they be applied in such a way that justice is done to all parties concerned'.⁹⁰

The promulgation of the court rules ensures transparency and consistency in the conduct of litigation and the administration of justice. The High Court Act empowers the Chief Justice to enact the rules of court dealing with the practice and procedure of the court.⁹¹ It is under these delegated powers that the Rules of the High Court⁹² were developed and enacted by the Chief Justice. Interestingly, no single provision in the High Court Rules makes or establishes the practice and procedure for the admission of amicus curiae. Given the wide delegated powers conferred on the Chief Justice to enact court rules for the practice and procedure of litigation, the absence of specific rules governing the practice and admission of amicus curiae before the High Court undermines the critical role played by amicus curiae in enriching jurisprudence, breathing life to the bill of rights and the general administration of justice in Botswana.

Despite this lacuna, the High Court has adopted a liberal approach towards the admission and practice of amicus curiae. The admission of amicus curiae in litigation before the High Court is permissible under the common law and in exercise of the far-reaching jurisdictional powers of the High Court conferred by the Constitution under s 95. The enactment of a specific practice procedure in the High Court Rules will undoubtedly result in certainty and recognise the importance of amicus participation. Given the nascent⁹³ and sporadic nature of amicus curiae participation in Botswana, there is good reason and logic for such participation to be formally entrenched in the High Court Rules to exorcise the ghost of uncertainty and promote civil society participation in public interest litigation at a court of first instance. It must be noted that the lack

⁸⁷ *Kgafela II v The Attorney General & Others; In re: Gabaokelwe v The Director of Public Prosecutions* (2012) 1 BLR 669 (CA) para 105.

⁸⁸ See *Monera v Fast tract (Pty) Ltd & Another* (2009) 1 BLR 409 (HC); *Kweneng Land Board v Murima* (Court of Appeal Civil Appeal No. 34/07).

⁸⁹ *Kweneng Land Board v Murima* (note 88 above).

⁹⁰ Ibid.

⁹¹ High Court Act s 26.

⁹² See s 28 of the High Court Act, 1974, Cap 04:02, which empower the Chief Justice to make rules regulating the practice and procedure of the High Court. The recently amended High Court Rules came into force on 8 January 2021 through Statutory Instrument No 1 of 2021.

⁹³ See O Jonas 'The Participation of the Amicus Curiae Institution in Human Rights Litigation in Botswana and South Africa: A Tale of Two Jurisdictions' (2015) 59(2) J of African Law 329.

of a specific procedure in the High Court Rules has not prevented the admission of amicus curiae before the High Court. The practice is that prospective amicus curiae seeking to be admitted approach the court by filing an application which is supported by an affidavit and solely relies on the generic common law principles governing the admission of amicus curiae.

2.2. The Court of Appeal Rules

The Court of Appeal Rules depart from the High Court Rules and provides for a clear and precise procedure for amicus curiae participation before the Court of Appeal. Rule 25 provides that 'Any party with a substantial interest in any appeal before the Court may, with the written consent of all parties to the appeal, and with the leave of the President, be admitted to the case as an amicus curiae on such conditions as the parties or the President may impose'.

Despite the fact that the Court of Appeal Rules confers the discretionary powers to admit amicus curiae to the President of the Court of Appeal, practice shows that the President does not consider such an application as a single judge. Such applications are considered within the context of a sitting panel led by the Judge President. However, the court rules state that 'any power vesting on the president under the rules may be exercised by a judge designated by the president for such purpose'.⁹⁴ The rules define the President as 'the president of the court, and in his absence the senior resident judge'. It is therefore not surprising in the few cases decided by the Court of Appeal where an application for the admission of amicus curiae was considered, the judgment was written by the judge president.

The Court of Appeal Rules further provides for conditions precedent to the admission of amicus curiae. A party must describe its interest in the litigation before court, identify the legal position to be adopted in the proceedings and set out legal arguments to be advanced, their relevance and why they will be useful to the court and how such submissions differ from those of the main parties to the litigation. Most interestingly, the Court of Appeal Rules imposes a condition that an amicus curiae application must be accompanied by the written consent of all other parties to the appeal for purposes of admission.⁹⁵ Although it is commendable that the Court of Appeal Rules provides for a specific procedure and mechanism for amicus curiae practice in Botswana, it is argued that the inclusion of instances where costs may be awarded against amicus curiae may place a heavy burden on prospective amicus curiae. This is so because the rules do not provide instances where it will be appropriate to award costs against amicus curiae. For instance, the Trade Disputes Act provides limited and specific instances where the Industrial Court may award costs. It can only do so where a litigant has abused the court process and instituted a frivolous and vexatious claim. The Court of Appeal Rules must take a similar posture to limit instances where amicus curiae may be mulcted with a cost order. This will provide certainty and clarity in instances where a costs order may be awarded against amicus curiae. Without this clarity in the rules, amicus curiae participation may be discouraged and the very essence of amicus curiae participation defeated in public interest litigation. The Constitutional Court of South Africa provides a sound justification on why amicus curiae must not be awarded costs: 'An amicus, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs. Whether there may be circumstances calling for the departure from this rule is not necessary in this case. Suffice to say that in this present case no such departure is warranted'.⁹⁶

⁹⁴ Court of Appeal Rules rule 12 sub-rule 3.

⁹⁵ Ibid rule 15 sub-rule 3(a)-(d).

⁹⁶ *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17 para 63.

The same reasoning is equally applicable to an argument that an amicus curiae must not be mulcted with a costs order since it is neither a winner nor a loser in litigation. As an exception to the general rule, costs may only be awarded where the amicus curiae abuses the procedure and institutes an application for admission on a frivolous and/or vexatious basis. However, these limited instances must be specifically provided for in the Court of Appeal Rules for certainty and clarity purposes. It is argued that to promote amicus curiae participation in Botswana, the amicus curiae must be protected and insulated from costs orders, save in exceptional circumstances, by reason that their participation is mainly to vindicate constitutional rights, and not to advance private or commercial interests.

The Court of Appeal Rules provides for another distinct procedure for the admission and participation of amicus curiae in Botswana. The Court of Appeal may, *ex mero mutui*, invite the Attorney General or any legal practitioner to appear as amicus curiae on *pro deo* basis.⁹⁷ It is not clear from the Court of Appeal Rules whether an amicus curiae whose participation in litigation was at the specific invitation of the court may suffer a costs order in the same way that an amicus curiae who approaches the Court of Appeal for admission may. There is no good reason to treat an amicus curiae who is invited *ex mero mutui* any different from an amicus curiae who makes an application to court with regard to costs. Awarding costs order against amicus curiae as it is contemplated by the Court of Appeal Rules is not only regressive but also offends against public interest.

3. Practice of Amicus Curiae in Botswana: Stocktaking, Impact and Future

Having traversed the nature, character and practice of amicus curiae participation, the paper now turns on assessing the impact, if any, of such participation in Botswana through the lens of decided cases. The paper will further forecast on the future of amicus curiae participation in Botswana. Spies posits that the impact of amicus curiae participation can be direct or indirect. On direct impact, Spies states that 'the direct impact of litigation refers to changing a law and/or policy, especially through the extension of rights, which has a direct impact on the applicant's lives'.⁹⁸ Indirect impact is multi-layered and entails instances where amicus curiae participation achieves and draws public attention to a particular legal issue or problem, sensitising the community and developing jurisprudence for future cases.⁹⁹ A favourable outcome of litigation is not a primary objective in so far as indirect impact of amicus curiae participation is concerned. Songer and Sheehan summaries the indirect impact of amicus participation as follows:

Amicus participation may also provide a vehicle to generate publicity about a case that will help to mobilize opinion behind expected future group action in other forums. Groups may also file briefs in an attempt to shape long-term Court policy; even if they do not expect to influence the outcome of a present case, they may hope to plant ideas in the justices' minds that will make them more receptive to groups' arguments in future cases. Another possibility is that amicus briefs may influence the content of opinions even though they have little impact on the overall outcome.¹⁰⁰

The impact of amicus curiae participation on judicial outcomes in Botswana will be assessed in the prism of direct and indirect impact by evaluating decided cases decided by the local courts.

⁹⁸ A Spies 'Reconsidering the amicus curiae participation in *S v Zuma*: Lessons for future participation' (2015) 28 *SA J of Criminal Justice* 59, 69.

⁹⁹ *Ibid.*

¹⁰⁰ D Songer & R Sheehan 'Interest group success in the courts: Amicus participation in the Supreme Court' (1993) 46 *Political Res Q* 339.

In this landmark judgment of the High Court of Botswana, the applicant approached the High Court seeking to declare certain provisions of the Penal Code ultra vires the Constitution of Botswana in so far as the said sections discriminate against homosexuals. The Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) applied to court to be admitted as amicus curiae. One major noticeable impact of the admission of LEGABIBO as amicus curiae is the introduction of expert evidence of a medical sociologist. The expert evidence traversed new grounds that were beyond the reach of the parties to the litigation and the court. The contribution of the amicus curiae through the introduction of the expert evidence in the litigation is worth mentioning. Leburu J stated:

The sum and effect of the medical sociologist's (expert) scientific criteria, is that lesbians, gays, bisexuals, trans genders and intersex people living in Botswana, experience higher levels of violence than have been reported; that such people experience sexual orientation and gender identity-related discrimination when accessing healthcare services; on account of the negative stigma attached to such persons, that Sections 164(a) and (c), 165 and 167 of the Penal Code, constitute examples of structural stigma; i.e. social stigma that is institutional or made into law. According to the expert, the empirical research evidence presented, was informed by a cross-sectional quantitative study, (2016/17) conducted in Botswana, Lesotho, Kenya, Malawi, South Africa, Swaziland, Zambia and Zimbabwe. This study has been approved by the Review Board, Office of Research and Development; University of Botswana (UBR/RES/IRB/BIO/009) and the Ministry of Health and Wellness, Republic of Botswana (HPDME: 13/18/1). The expert, in the study, is the International Principal Investigator.¹⁰²

It is submitted that the expert evidence played a pivotal role in tilting the scales in favour of the applicant and greatly assisted the court with crucial, relevant and novel information that the litigants would not ordinarily avail to the court. The outcome of the *Motshidiemang* case is testimony to the direct impact of amicus curiae participation as the judgment which was subsequently upheld at appeal has resulted in a change of law. It is highly likely that it was on this score that the court extended gratitude to the amicus curiae for its participation in the litigation. The court appreciated the role of the amicus curiae in the following terms, 'Before I conclude, I am greatly indebted to the attorneys and advocate who appeared before us, and their erudite submissions and heads of argument that assisted the Court in this weighty matter. The amicus was not only a friend in need, but a friend indeed'.¹⁰³ In the context of Botswana, the court's acknowledgement and appreciation of the amicus curiae was unprecedented and may have bolstered amicus curiae participation in future litigation in Botswana. The above notwithstanding, an isolated case cannot be a measure of the impact of amicus curiae participation in Botswana. Such an approach will be cursory. This paper will proceed to assess other cases where the courts admitted amicus curiae and their resultant impact on judicial outcomes.

*Kgafela II v The Attorney General & Others: In re Gabaokelwe v The Director of Public Prosecutions*¹⁰⁴

In the *Kgafela II* case, the Court of Appeal reiterated the principle that an applicant must satisfy the 'test of usefulness' in order to be admitted as amicus curiae. The case represents a classical misuse of amicus curiae participation by a party who has initiated legal proceedings. Before the

¹⁰¹ *Letsweletse Motshidiemang v Attorney General* (note 80 above).

¹⁰² Ibid paras 34 and 35.

¹⁰³ Ibid para 227.

¹⁰⁴ Note 87 above.

High Court, Kgafela II, a local chief, and Ditswanelo, a human rights advocacy group, sought a rule nisi calling upon the Attorney General to show cause why an order should not be made final for the permanent stay of execution of the death penalty sentences imposed on Gotlhalosamang Gabaokelwe, Modise Tlhokamolelo and Mangombe Tadubane. The High Court had dismissed the application for lack of standing by both the applicants. The appellants appealed this decision and raised a constitutional challenge to the validity of Botswana's Constitution.

Both appellants argued before the Court of Appeal that in the alternative, the High Court ought to have granted them locus standi to institute the proceedings as friends of the court. In response to the request for Kgafela II, who is the traditional leader of the Bakgatla tribe, to be treated as amicus curiae for purposes of his standing, the Court of Appeal stated: 'In the case of the first appellant (Kgafela II), there is no suggestion that Gabaokelwe is a Mokgatla tribesman or is one of his subjects. His argument that he has status as a general champion of the down-trodden cannot be sustained. However honorable his motives may be, he is attempting without authority to intervene in someone else's criminal case, which does not concern him personally. This is not permissible'.¹⁰⁵

In response to the argument of Ditswanelo's argument that it be treated as amicus curiae for purposes of clothing it with the requisite locus standi, the court correctly stated:

In the case of Ditswanelo, they too have no mandate from the prisoner. Theirs is a general complaint about the constitutionality of the death penalty and cruelty of hanging or its manner of execution. To allow them locus standi in present circumstances would be in effect to revive the actio popularis, which we do not intend to do, and nor has any powerful argument been presented for its revival, even assuming that this court had the power to do so ... Instead it has raised again well-worn arguments against the death penalty and against hanging which were fully canvassed and dealt with by the full bench in Kobedi. It has also failed to show a sufficient interest in or connection with this case specifically as opposed to death penalty generally.¹⁰⁶

*The Law Society v Dingake & Others*¹⁰⁷

The misuse of the amicus curiae procedure in Botswana did not end with the Kgafela II case. In this case, the Law Society sought to be admitted in review litigation involving judges of the High Court who were suspended following a petition they addressed to the then Chief Justice. In considering the application for the admission of amicus curiae, the court made an interesting observation that the applicant seeks to be admitted, not as a friend of the court, but as a friend of the suspended judges. On this basis, the High Court refused the application and observed that 'the applicant has not demonstrated a sincere or dispassionate approach to what it seeks. All it does is seek to argue the case of one of the parties in the substantive application'.¹⁰⁸

It is argued that the *Kgafela II* and the *Law Society* cases represent the classical misuse of the amicus curiae procedure by litigants. This may be attributed to a number of reasons. Firstly, the failure to codify the common law principles governing amicus curiae participation in Botswana at the High Court level is problematic. Both cases were decided by the High Court with reliance on common law principles. The lack of a procedural mechanism for amicus curiae participation is undesirable for the proper administration of justice. Secondly, amicus curiae participation is perceived as a convenient mechanism to jump into the fray where the prospective amicus curiae

¹⁰⁵ Ibid para 109.

¹⁰⁶ Ibid para 110.

¹⁰⁷ *The Law Society of Botswana v Dingake & Others* Case No MAHGB-000783-15 (unreported).

¹⁰⁸ Ibid para 43.

simply wants to add its voice in favour of one side over the other. Thirdly, poor draftsmanship and preparation of pleadings may be the likely cause resulting in misuse of this procedure. A party approaching court for amicus curiae admission must demonstrate novelty and relevance in the arguments it will advance before the court to assist the court in rendering justice to the issues before it. Vague and bald averments will not be sufficient to secure admission as amicus curiae.¹⁰⁹

It is argued that amicus curiae play a pivotal role in the administration of justice and, as such, the amicus curiae participation mechanism must be utilised for the sole reason of being of assistance to the court, not the parties to the dispute. The amicus curiae owes a fiduciary duty to the court, no one else. Prospective applicants must carefully draft pleadings in a delicate manner that will reveal and satisfy with ease the objective test required for purposes of admission. Similarly, courts must adopt a liberal approach in admitting amicus curiae because an amicus curiae is essentially an extension of the court which can promote participation in judicial outcomes.

*Good v The Attorney General*¹¹⁰

The participation of amicus curiae in the *Good* case was also a missed opportunity in Botswana to advance the frontiers of human rights and the protection of constitutional rights through amicus curiae participation. The mechanism was misused by a human rights advocacy body to advance public perceptions and not novel and relevant legal and factual issues which may be beneficial to the court. The court was not impressed with the line of argument adopted by the amicus curiae and stated that:

The amicus curiae has argued that it was the public perception in Botswana that Good was being declared a prohibited immigrant as punishment for being an outspoken critic of the government and to stifle freedom of expression and conscience. He also argues that the only factor that could have prompted Good's deportation was his record of being outspokenly critical of the government, which criticism the president wished to silence and at the same time to send a message to others who might wish to be over-critical of the government. The president's declaration was made coincidentally with Good's expose on presidential succession in Botswana.¹¹¹

In reaction to the averments made by the amicus curiae, the court expressed its displeasure with the contribution to the discourse and stated that 'it would be irresponsible in the highest degree for this court to make findings based on speculative submissions and on perceptions which may or may not be held by the public without any reliable factual material to support them'.¹¹² The court's displeasure as expressed by the Court of Appeal is a serious indictment on amicus curiae participation in Botswana. Such views, expressed by the apex court, exposes the limitations and lack of capacity by civil society organisations and human rights defenders in Botswana to properly utilise and exploit amicus curiae participation to advance human rights, constitutionalism and the rule of law through public interest litigation. The net effect of this incapacity and limitations to properly utilise the amicus curiae procedure seriously negates the impact of amicus curiae participation in Botswana.

¹⁰⁹ Ibid paras 30 and 31.

¹¹⁰ (2005) 2BLR 337 (CA).

¹¹¹ Ibid 17.

¹¹² Ibid 18.

In the *Kewagamang* case, the High Court departed from the seemingly rigid approach adopted in the *Kgafela II* and the *Law Society* cases discussed above. In this case, the Law Society applied to be admitted as *amicus curiae* in a review application. The averments of the Law Society in support of its application to be admitted as *amicus curiae* were not only ordinary but also vague and bald. However, the court admitted the Law Society as *amicus curiae* and adopted a liberal approach towards such applications. Ketlogetswe J reasoned:

In Botswana, we have no written rules governing the procedure on applications for admissions as an *amicus*, and in my view it would be undesirable to apply, and insist strictly, on a given criteria, which is unwritten and unspecific and expect parties to religiously comply with it. I think it would be best to leave the enquiry as flexible as possible to ensure that access to justice, and the ability of the courts to benefit from the input of parties appearing as *amicus* is not stifled by insistence on technicalities.¹¹⁴

It is submitted that the liberal and flexible approach adopted in the *Kewagamang* case is desirable and justified, especially in instances where there are no specific and certain rules governing *amicus curiae* participation before the High Court. The fundamental weakness of this approach is that although it advances a liberal approach, the reasoning of the court seems to ignore the legal validity of common law principles in instances where there is no statutory codification of such principles.

After traversing the key judgments which considered the admission of *amicus curiae* in Botswana, it can be safely concluded that the impact of such participation is tepid in terms of contributing to judicial outcomes. As discussed above, there is evidence that there is, to a greater extent, a paucity of *amicus curiae* participation and the lack of a rules-based procedure in the High Court contributes to the misuse of the procedure. The impact of *amicus curiae* participant in Botswana is therefore sporadic, incoherent and disjointed. The only instance where the impact of *amicus curiae* participation is visible in Botswana is in the *Letsweletse Motshidiemang* case discussed above. The distinguishing factor in this case from other cases where the *amicus curiae* procedure was misused in Botswana is that in *Letsweletse Motshidiemang*, the *amicus curiae* presented cogent and irrefutable expert evidence that was of great assistance to the court. It is in such isolated instances where *amicus curiae* participation can be said to have had a direct and material impact, both in judicial outcome and jurisprudential development. The case is indeed a classical benchmark for *amicus curiae* participation in Botswana and globally.

Given the sporadic use and misuse of *amicus curiae* participation, it is difficult, if not impossible, to forecast the future of *amicus curiae* participation in Botswana. The practice of *amicus curiae* participation in Botswana is in distress and requires deliberate legislative reforms in order to realise its true potential in advancing human rights and contributing to the body of human rights jurisprudence.

¹¹³ Note 83 above.

¹¹⁴ Ibid para 49.

4. Conclusion

The amicus curiae has become a vital player in the litigation of many domestic courts, especially in public law cases. This article notes that amicus curiae interventions in Botswana is slowly but steadily rising, especially in cases of constitutional or public importance. However, these interventions are not adequately regulated. In fact, only the Court of Appeal Rules make provision for this procedure, albeit in underspecified and incomprehensive terms. This is inadequate for effective control and management of these intervenors. Proper and comprehensive regulation will ensure that amicus curiae are allowed to participate in judicial proceedings without impeding a timely cost-effective and efficient resolution of cases.

This chapter also reveals that although the amicus participation in Botswana is modest, a review of relevant cases shows that the courts have begun to rely on amicus curiae briefs in their decision-making calculus as evidenced by the decision in *Letsweletse Motshidiemang v Attorney General*.¹¹⁵ However, in the majority of cases, the courts merely indicate that they have received briefs from amicus curiae without discussing their input at the evaluative part of the judgment, thus making the impact of the brief difficult to establish. Amicus curiae participation also assists to overcome the democratic legitimacy deficit that haunts the judicial institutions in general by adding the diverse opinions of the public and audiences to the decision making process of the courts in Botswana.

¹¹⁵ Note 80 above.

CHAPTER 4: The Amicus Curiae Context, Law and Practice in Uganda

Beatrice Kayaga

1. Introduction

1.1 Background

In Uganda, the practice of filing amicus curiae briefs is a relatively new development. Prior to the last quinquennium, Ugandan courts rarely heard amicus curiae petitions. This was primarily due to the courts' conservative approach to admitting amicus briefs, as well as the lack of specific legislation and consistent jurisprudence to guide Ugandan courts on the practice and procedure of admitting amicus curiae briefs.

On a more positive note, the country has yet to enact the draft Judicature (Amicus Curiae) Rules, 2021 (draft Judicature (Amicus Curiae) Rules) to streamline the procedure and practice of admitting amicus curiae briefs and the courts have loosened their grip on admitting more amicus briefs over the last five years. The practice of filing amicus briefs appears to be steadily increasing in Uganda.¹¹⁶

This paper investigates Ugandan law and practice regarding the admission of amicus curiae briefs. It traces the historical context of amicus curiae practice in Uganda and analyses some of the leading case law on the subject, with a focus on the impact of the court's decisions on the evolution of the practice in Uganda.

The paper also identifies gaps in Ugandan amicus practice and, finally, proposes viable reforms.

1.2. The meaning of 'amicus curiae'

Amicus curiae (Latin for 'friend of the court') is a person or organisation who is not a party to a law suit but who petitions the court or is requested by the court to file a brief in an action because that person has a strong interest in the subject matter.¹¹⁷ An amicus curiae is independent with no inclination to any of the parties before court. His or her duty is to assist court by offering information, expertise or insight that has a bearing on the issues in the case before the court.¹¹⁸

This definition of amicus curiae was adopted by the Supreme Court of Uganda in *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others*¹¹⁹ and by the same court in *Re: Application for leave to intervene as amicus curiae by Foundation for Human Rights Initiative & 7 others*.¹²⁰ In *Re: Application to intervene as amicus curiae by Bank of Uganda*,¹²¹ the Court of Appeal of Uganda expounded on the meaning of amicus curiae, referring to Osborn's Concise Law Dictionary, which defines amicus curiae as 'a person who calls the attention of court

¹¹⁶ Observed by the Supreme Court in *Re: Application for leave to intervene as amicus curiae by Foundation for Human Rights Initiative & 7 others* Civil Application No 3 of 2016 [2016] UGSC 1, 8.

¹¹⁷ BA Garner *Black's Law Dictionary* 9 ed (2009) 98. See also J Oloka-Onyango & C Mbazira *Befriending the Court: Behind and Beyond the 2016 Supreme Court Amicus Curiae Rulings in Uganda* (2020) 3.

¹¹⁸ <<https://cepiluganda.org/process/amicus-curiae-proceedings/>>.

¹¹⁹ Civil Application No 2 of 2016 [2016] UGSC 2.

¹²⁰ Note 116 above.

¹²¹ Civil Application No 16 of 2021 [2021] UGCA 120.

to some point of law or fact which appears to have been overlooked'.¹²² Amicus curiae may also refer to counsel who assists the court by presenting arguments in support of an interest that the parties to the proceedings may not adequately represent, such as public interest, or by arguing on behalf of a party who is otherwise unrepresented.¹²³

The Rules Committee¹²⁴ adopted these case law definitions of amicus curiae in the draft legislation of 2021 on amicus curiae. To that end, rule 3 of the draft Judicature (Amicus Curiae) Rules defines amicus curiae as a person or organisation who is not party to proceedings but who petitions the court or who is invited by the court to file a brief in the proceedings because that person or organisation has sufficient interest in the subject matter. This definition is preferred because it expressly includes 'organisations', which are the most common applicants in amicus curiae briefs, and elaborates that amicus curiae may apply to court or be invited by the court to file an amicus curiae brief. This appears to be the interpretation of the term 'amicus curiae' in Uganda.

2. The Historical Context of Amicus in Uganda

2.1. Pre- and post-colonial Uganda – the law and practice of amicus curiae prior to 1995

Uganda had been a British protectorate since 1894,¹²⁵ and as such it was governed by English statutory and common law.¹²⁶ By 11 August 1902,¹²⁷ the country had inherited a series of English laws based on common law principles, equity doctrines and statutes of general application in England and Wales. To this day, Uganda continues to apply common law principles and equity doctrines, whereas the statutes of general application from England and Wales ceased to apply and were replaced by Ugandan domestic legislation enacted by the Parliament of Uganda under art 79(1) of the Constitution of the Republic of Uganda, 1995, as amended (the Constitution).¹²⁸

Uganda's legislation does not specify a procedure for admitting amicus curiae briefs therefore courts invoke their inherent power to administer justice as prescribed by s 98 of the Civil Procedure Act¹²⁹ and s 39(2) of the Judicature Act¹³⁰ which allows courts to adopt any procedure as justifiable by the circumstances of the case. In the absence of a procedure laid down by written law, the courts under s 98 of the Civil Procedure Act have inherent power to make such orders as are necessary for the ends of justice or to prevent abuse of the court process. This includes the authority to accept amicus curiae briefs on any issue in a pending case and since this came into force on 1 January 1929, courts have had the authority to accept amicus curiae briefs. Section 98 of the Civil Procedure Act is replicated in rule 2(2) of the Judicature (Court of Appeal Rules) Directions Statutory Instrument 13-10 and rule 2(2) of the Judicature (Supreme Court Rules) Directions Legal Notice 13 of 1996, which apply specifically to the Court of Appeal and the Supreme Court respectively.

While the Civil Procedure Act allows Ugandan courts to admit amicus briefs as part of their inherent power to administer justice, the accompanying rules, the Civil Procedure Rules Statutory

¹²² 11 ed (2009).

¹²³ *The Oxford Dictionary of Law* 5 ed.

¹²⁴ Established by the Chief Justice under s 41 of the Judicature Act Cap 13 to make rules for regulating the practice and procedure of the courts in Uganda.

¹²⁵ GW Kanyeihamba *Constitutional and Political History of Uganda: From 1894 to present* 2 ed (2010).

¹²⁶ J Oloka-Onyango *An Overview of the Legal System in Uganda* (2015).

¹²⁷ This was the reception date for the Uganda Order in Council, 1902 which formally ushered English statutory law into Uganda. See observations of the Supreme Court of Uganda in *Uganda Motors Ltd v Wavah Holdings Ltd* Supreme Court Civil Appeal No 19 of 1991 and the Judicature Act of 1962.

¹²⁸ See s 14(2) of the Judicature Act, ch 13 of the laws of Uganda, on the laws applicable in Uganda.

¹²⁹ Chapter 71 of the laws of Uganda.

¹³⁰ Chapter 13 of the laws of Uganda.

Instrument 71-1,¹³¹ do not expressly prescribe a mode or procedure for filing amicus applications. As a result, the practice has been to rely on order 52 rules 1 and 3 of the Civil Procedure Rules, which state that all applications to court, except those expressly provided for in the rules, must be made by notice of motion accompanied by an affidavit. The grounds for the application must be stated in general terms in the notice of motion.¹³²

Despite the above statutory provisions, there were no practice directions or established case law to guide the courts on the considerations or conditions for admitting amicus briefs prior to 1995. Furthermore, on 24 September 1989, the Supreme Court issued a ruling in *Attorney General v Silver Springs Hotel Ltd & others* stating that appearance by amicus curiae must be at the invitation of the court and not by application.¹³³ This supports Joe Oloka-Onyango and Christopher Mbazira's assertion that Ugandan courts largely took a conservative approach to the admission of amicus curiae briefs in Uganda.¹³⁴

These, among other factors, appear to be the reasons why filing amicus briefs was uncommon in Uganda. In *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others*, the Supreme Court of Uganda noted that prior to that application, there had been few instances when the court was moved by applicants seeking to be amicus curiae.¹³⁵ Therefore, amicus curiae applications were not very common tools in the various benches of the Ugandan judiciary¹³⁶ and until recently, the procedure was not well developed and the courts only received a small number of amicus briefs.

2.2. Subsequent developments – the law and practice of amicus curiae after 1995

Uganda's fourth and current Constitution was promulgated on 8 October 1995¹³⁷ and art 1 states that all power (including judicial power) belongs to the people. Article 126 is more specific on judicial power and provides for the participation of the people in the administration of justice. According to art 126(1), judicial power is derived from the people and shall be exercised by the Courts of Judicature in their name and in accordance with the law, values, norms and aspirations of the people. Furthermore, art 127 directs Parliament to pass laws allowing citizens to participate in the administration of justice by the courts.

Clearly the practice of filing amicus curiae briefs is one of the notable tools for increasing public participation in the administration of justice by the courts, as it allows the public, as amici curiae, to assist the court by drawing to its attention novel issues of great public importance that the litigants may have overlooked. Since the adoption of the 1995 Constitution, the courts have relied on art 126(1) of the Constitution as justification for allowing amicus curiae briefs. As a result, Uganda's number of amicus petitions has steadily increased.¹³⁸

Secondly, the Rules Committee has since attempted to streamline the process of filing amicus curiae briefs by prescribing a method of instituting amicus petitions. To that end, rule 7 of

¹³¹ Promulgated on 31 January 1964.

¹³² The practice was upheld by the Supreme Court in *Re: Application for leave to intervene as amicus curiae by Foundation for Human Rights Initiative & 7 others* (note 116 above) 7.

¹³³ Supreme Court Civil Appeal No 1 of 1989. This position was reversed by the Supreme Court 27 years later in *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others* (note 119 above) 10.

¹³⁴ Oloka-Onyango & Mbazira (note 117 above).

¹³⁵ Note 119 above 9 and 10. Also observed by the court in *Re: Application for leave to intervene as amicus curiae by Foundation for Human Rights Initiative & 7 others* (note 116 above) 7.

¹³⁶ Note 129 above.

¹³⁷ O Furley & J Katalikawe 'Constitutional Reform in Uganda; The New Approach' (1997) 96(383) *African Affairs* 243 <<https://www.jstor.org/stable/723860>>

¹³⁸ The Supreme Court relied on art 126 of the Constitution in *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka*

the draft Judicature (Amicus Curiae) Rules states that a person or organisation who meets the requirements to apply as amicus curiae may apply by notice of motion or be invited to appear in court as amicus curiae by the court through a letter.

Rule 7(2) of the draft Judicature (Amicus Curiae) Rules adds that the application must be accompanied by a formal brief indicating the person's or organisation's expertise or justification for consideration as amicus curiae. Rule 7(4) specifies the format for amicus briefs. The application must be filed within 15 days of the close of the pleadings¹³⁹ and any party intending to object to the application must notify the court in writing within seven days.¹⁴⁰ He or she must then file a notice of objection to the application.¹⁴¹

Another significant development is that the Supreme Court has since adopted a set of principles to guide lower courts in deciding whether to accept or reject amicus curiae petitions.¹⁴² It should be noted that the participation of amicus curiae is purely at the discretion of the court in exercise of its inherent powers; amicus curiae can be relevant where the court is of the opinion that the matter before it requires some kind of expertise which is in the possession of a specific individual or organisation and therefore the ultimate control or admission of amicus curiae lies exclusively with the court.

The requirements for admitting amicus curiae have been codified in rule 5 of the draft Judicature (Amicus Curiae) Rules as follows: the amicus curiae must be neutral and impartial; the submissions of amicus curiae must be intended to give assistance to the court that it would not otherwise enjoy; the amicus curiae must be limited to engagement with matters of law; the submissions of amicus curiae should draw attention to relevant matters of the law and be useful, focused and principled legal submissions not favouring any of the parties; the amicus curiae must have valuable expertise in the relevant area of the law (general expertise in the law does not suffice); the points of law or facts to be discussed should be novel and aid the development of jurisprudence; the participation of amici curiae must be in the wider interest of public justice; the interest of the amicus curiae is its 'fidelity' to the law; the amicus curiae should address the court on points of law not raised by the parties but of concern to the court; the amicus curiae has a duty to remind the court of legal matters which have escaped the court that may cause a wrong interpretation of the law; an amicus curiae shall not introduce new or fresh evidence; and lastly, the court has the duty to regulate the extent of amicus participation in the proceedings to forestall the degeneration of amicus role to partisan role.¹⁴³

While the court has yet to clarify whether all of the above requirements must be met for an amicus curiae brief to be accepted, the Supreme Court's rulings and subsequent codification of the above principles in the draft Judicature (Amicus Curiae) Rules have gone a long way to improving Uganda's jurisprudence on amicus curiae practice, encouraging the filing of amicus applications and creating uniformity and consistency in admitting amicus applications.

¹³⁹ Draft Judicature (Amicus Curiae) Rules, 2021 rule 7(7).

¹⁴⁰ Ibid rule 7(8).

¹⁴¹ Ibid rule 8(2).

¹⁴² See ruling of the Supreme Court in *Re: Application for leave to intervene as amicus curiae by Foundation for Human Rights Initiative & 7 others* (note 116 above) and ruling of the Supreme Court in *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others* (note 119 above).

¹⁴³ The principles were also followed by the Court of Appeal in *Re an Application to intervene as amicus curiae by Bank of Uganda* (note 121 above) 5.

3. Uganda's Case Law on Amicus Curiae Practice

In the absence of legislation to guide courts on the principles for accepting amicus curiae briefs, Ugandan courts have adopted common law principles and case law from comparative jurisdictions over the years.¹⁴⁴ These decisions have had a significant impact on the law and practice on amicus in Uganda.

3.1. Case law prior to 1995

Prior to the promulgation of the Constitution in 1995, the courts received very few amicus curiae petitions because such intervention was only by invitation of the court,¹⁴⁵ and there were no principles to guide the courts and litigants on the procedure for admitting amicus curiae petitions. This explains why there are not many cases on the subject at that time. However, the following cases demonstrate the practice of amicus curiae in Uganda prior to 1995.

3.1.1. *Attorney General v Silver Springs Hotel Ltd & others*¹⁴⁶

In this case, the respondents challenged the Minister of Finance's decision to repossess several properties taken over from Asian owners by President Idi Amin's military government in 1972. At the commencement of the hearing of a further appeal to the Supreme Court, counsel for the former owner of one of the properties asked to intervene as amicus curiae, claiming that the parties to the appeal had decided to settle out of court behind his client's back.

In response to his application, the court determined that amicus curiae must be invited by the court.¹⁴⁷ It was not for a person to apply to be invited. Furthermore, the court determined that because the applicant represented the interests of his client, he was not neutral and thus did not qualify to intervene as amicus curiae.

The lower courts strictly adhered to the decision. For instance, in *Oboth Marksons Jacobs v National Resistance Movement*, the High Court ruled that the court should be allowed to choose or approve its friends.¹⁴⁸ Furthermore, in *Soroti Joint Medical Services Limited v Sino Africa Medicines & Health Limited*, the High Court in rejecting a petition for amicus curiae ruled that if the court requires assistance, it is upon it to seek the opinion of amicus curiae on any matter.¹⁴⁹

This position had the effect of stifling the practice of amicus curiae by limiting it to a select few who intervened by invitation of the court. The Supreme Court overturned this decision 27 years later in *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others*,¹⁵⁰ where it held that the ruling in *Attorney General v Silver Springs Hotel Ltd* was no longer good law.

¹⁴⁴ Ugandan courts have adopted principles from leading case law on amicus from Kenya such as *The Trusted Society of Human Rights Alliance v Mumo Matemo & the Kenya Section of the International Commission of Jurists Supreme Court Petition No 12 of 2013* and decisions of the East African Court of Justice including *Secretariat of the Joint UNAIDS Programme on HIV/ AIDS v Human Rights Awareness Promotion Forum (HRAPF) & Attorney General of Uganda Application No 03 of 2015*; *Uhai Eashri, Health Development Initiative Rwanda v Human Rights Awareness Promotion Forum (HRAPF) & Attorney General of Uganda Applications Nos 20 & 21 of 2015*; *Dr Ally Possi, Centre for Human Rights, University of Pretoria v Human Rights Awareness Promotion Forum (HRAPF) & Attorney General of Uganda Application No 01 of 2015*.

¹⁴⁵ Observed by the Supreme Court in *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others* (note 119 above) 9 & 10.

¹⁴⁶ Note 133 above.

¹⁴⁷ Ibid 5.

¹⁴⁸ Miscellaneous Application No 108 of 2010.

¹⁴⁹ Miscellaneous Application No 452 of 2011.

¹⁵⁰ Note 119 above.

3.1.2. *Edward Fredrick Sempebwa v Attorney General*¹⁵¹

The applicant filed High Court Case No 1 of 1986, in which he challenged the legality of Legal Notice No 1 of 1986, as amended by Legal Notice No 6 of 1986. The statutory instrument sought to enact a new order of government that would deprive the applicant of the decretal sum and orders entered in his favour by the High Court in High Court Civil Suit No 135 of 1982.

The court rejected an application by a third party to intervene as *amicus curiae* in the legal action on the grounds that the applicant intending to be *amicus curiae* had failed to demonstrate what point of law was overlooked and that the parties were ably represented. This case evidenced the conservative approach taken by Ugandan courts at the time in admitting *amicus* petitions.

The case also highlighted the lack of established principles, at the time, to guide courts in admitting *amicus* briefs. Furthermore the approach also seems to ignore public interest, where the decision will have impact beyond the parties to the case.

3.2. Case law after 1995

Since the promulgation of the Constitution in 1995, the practice of *amicus curiae* has steadily improved. The following case law illustrates the subsequent developments in *amicus* practice in Uganda.

3.2.1. *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others*¹⁵²

Following the 2016 presidential elections in Uganda, one of the candidates, Amama Mbabazi, was dissatisfied with the re-election of the incumbent, President Yoweri Kaguta Museveni, and challenged the election in the Supreme Court of Uganda.¹⁵³ Nine Makerere University School of Law lecturers petitioned the court to intervene as *amicus curiae* in the petition. The respondents objected to the application on grounds that the applicant's brief was too general and did not introduce anything novel.¹⁵⁴ They also objected that the applicants did not demonstrate special or unique expertise in constitutional law and that they are neutral in the parties' dispute. The Supreme Court granted the application and admitted the applicants as *amici curiae* in its ruling on 14 March 2016.

The court's decision was based on the following findings: the applicants proved their expertise in human rights, constitutionalism and good governance and therefore qualified as *amici curiae*; the earlier ruling of the court in *Attorney General v Silver Springs Hotel Ltd & others*¹⁵⁵ to the effect that an appearance by *amicus curiae* must be at the invitation of court and not by application of a party seeking that status was no longer good law; and while objections to *amicus curiae* briefs are a factor to be taken into consideration, it is not the only determining factor.¹⁵⁶ The court is required to balance the wider interest of justice and the benefit of the participation of the intended *amicus curiae* to courts against the risk of the *amicus curiae* descending into the litigation between the parties; in light of the concerns on bias alleged by the respondents, the court would only take what it considers to be relevant and non-partisan from the *amicus*

¹⁵¹ Miscellaneous Application No 90 of 1986.

¹⁵² Note 119 above.

¹⁵³ *Amama Mbabazi v Yoweri Kaguta Museveni & 2 others* Presidential Election Petition No 1 of 2016 [2016] UGSC 4.

¹⁵⁴ Note 119 above.

¹⁵⁵ Note 133 above.

¹⁵⁶ The Supreme Court followed the ruling of the East African Court of Justice in *Re: An application by the Secretariat of the Joint UNAIDS Programme on HIV/ AIDS v Human Rights Awareness Promotion Forum (HRAPF) & Attorney General of Uganda* Application No 03 of 2015.

curiae brief and ensure that the amici curiae does not overstep their brief; the matters raised in the presidential petition were of great public importance which outweighed the concerns or objections raised by the respondents to the applicants' brief; and lastly, that the applicants intended to give assistance to the court on the law on structural interdicts or supervisory injunctions which was a novel matter in Uganda and more specifically in electoral disputes. The assistance of amicus curiae in this regard would essentially benefit the court.

The Supreme Court's ruling above is of critical importance to Uganda's jurisprudence on the practice of amicus briefs because it was the first time the court exhaustively stated the principles for accepting amicus curiae briefs. These principles have since been followed by lower courts when dealing with similar applications, thereby streamlining the law on the procedure and practice of amicus curiae petitions. The same principles have also been codified in rule 5 of the draft Amicus Curiae Rules.

Secondly, the court encouraged the practice of filing amicus curiae applications by reversing its previous position in *Attorney General v Silver Springs Hotel Ltd & others*, which stated that amicus briefs are filed on the court's invitation rather than by making an application.¹⁵⁷

The ruling has the effect of allowing anyone or any organisation to apply to be admitted as amicus curiae without having to wait for the court to invite them.

Oloka-Onyango and Mbazira observed that the ruling of the Supreme Court in this case set a progressive precedent for admission of amicus curiae applications and clarified several issues including questions of bias, the expertise of the amicus applicants and the place of the public in amicus applications.

3.2.2. *Re: Application for leave to intervene as amicus curiae by Foundation for Human Rights Initiative & 7 others*¹⁵⁹

Following the 2016 presidential elections in Uganda, one of the candidates, Amama Mbabazi, filed Supreme Court Election Petition No 1 challenging the re-election of the incumbent, President Yoweri Kaguta Museveni. A coalition of eight civil society organisations filed a motion to intervene as amici curiae. The applicants contended that they possessed valuable expertise to assist the court in deciding the presidential election petition and that they had a strong interest in the subject matter of the petition.

The respondents in the election petition objected to the application on the grounds that the applicants lacked special expertise relevant to the subject matter of the petition, and they intended to present evidence about disputed facts. The respondents also contended that the applicants were biased and therefore unfit to be amici curiae.

The court rejected the application in its decision dated 14 March 2016, because the applicants did not meet the criteria for being accepted as amici curiae. The court specifically stated that the applicants failed to demonstrate their expertise on the subject of the petition. It further ruled that some of the applicants made statements in the aftermath of the election that were prejudicial to the respondents, implying that they were not impartial and, thus, did not qualify to be amici curiae. The court determined that because the applicants did not attach their intended amicus brief or demonstrate the novel points of law on which they intended to address the court, it was unable to determine the scope of their intervention as amici curiae.

¹⁵⁷ Note 133 above.

¹⁵⁸ Note 117 above.

¹⁵⁹ Note 116 above.

While the application was denied, it had significant jurisprudential value in the practice of amicus curiae briefs in Uganda because the court reiterated the principles on admission of such briefs, thereby affirming them. The court specifically stated that amicus curiae must be impartial and have valuable expertise relevant to the subject matter of the case before the court.

The lower courts have since followed these principles. Further, the principles have been codified in rule 5 of the draft Amicus Curiae Rules.

3.2.3. *Re: Application to intervene as amicus curiae by Bank of Uganda*¹⁶⁰

Bank of Uganda sought to intervene as amicus curiae in *Diamond Trust Bank & another v Ham Enterprises Limited & others*, in which the respondents sued the appellant banks in the High Court for breach of various loan agreements.¹⁶¹ Bank of Uganda argued that, as the statutory body charged with regulating banking and financial institutions' business in Uganda, it possessed valuable expertise that could assist the court in deciding the appeal.

The Court of Appeal dismissed the application in its ruling on 17 January 2021, with reasons that Bank of Uganda's interest in the appeal was not that of amicus curiae, but of a party who would be directly affected by the court's orders. Bank of Uganda stated in its application that the High Court's orders would have a negative impact on the performance of its statutory duties.

The court determined that a friend of the court is a neutral party, not a party who claims to be harmed by the orders at issue in the suit. The applicant did not meet the neutrality and impartiality requirements.

Furthermore, the Court of Appeal reiterated the Supreme Court's principles for accepting amicus briefs in *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others*. This decision is crucial because it is the most recent decision of a Ugandan court on amicus curiae.

The court's decision reflects the current state of the law in Uganda regarding amicus curiae applications. The decision is also significant because it clarifies the nature of interest of amicus curiae in the matter pending before courts, which should be to assist courts in proper application of the law. Thus, where the applicant's interest is of such a nature as to render him or her directly affected by the possible orders of the court, he or she is unfit to be amicus curiae.

Other relevant case law on amicus includes *National Social Security Fund & Others v Alcon International Ltd Supreme Court*, in which the court rejected the amicus curiae application on the grounds that the applicant did not demonstrate his expertise in the matter and did not demonstrate that he would be of assistance to the court in resolving the dispute before it¹⁶² and *Uganda v Thomas Kowyelo*, in which the court refused to hear the amicus curiae application on the grounds that the hearing in the main suit had already concluded and judgment in the appeal had been reserved.¹⁶³ The decisions reinforce the principles that amicus curiae must have valuable expertise relevant to the subject matter of the case already pending before the court and that the amicus application must be filed without delay, and before the main suit is heard.

¹⁶⁰ Note 121 above.

¹⁶¹ Civil Appeal No 242 of 2020.

¹⁶² Civil Appeal No 15 of 2009.

¹⁶³ Constitutional Appeal No 1 of 2012.

4. The Future of Amicus Practice in Uganda

While the Supreme Court of Uganda has made an effort to outline the principles and procedure for admitting amicus curiae briefs, there is still a need to codify the principles under domestic legislation in order to foster uniformity, consistency and transparency in considering amicus curiae applications, as well as to promote the enforcement of art 126 of the Constitution on people's participation in the administration of justice by the courts. There is currently no legislation in place to govern amicus curiae practice.

The Chief Justice of Uganda, Alfonse Chigamoy Owiny-Dollo CJ, revealed in his address on the occasion of the opening of the 23rd Annual Judges' Conference between 31 January 2022 and 3 February 2022, that the enactment of the draft Judicature (Amicus Curiae) Rules is nearing completion.¹⁶⁴ While this is good news, the rules' enactment has been long overdue, as comparative jurisdictions enacted amicus curiae rules as early as a decade ago. Uganda is attempting to catch up.

For comparison purposes, on 11 April 2013,¹⁶⁵ the East African Court of Justice,¹⁶⁶ to which Uganda is subject by virtue of its membership in the East African Community,¹⁶⁷ promulgated laws on amicus curiae under rule 36 of the East African Court of Justice Rules of Procedure, 2013.¹⁶⁸ Kenya, Uganda's most immediate neighbour, legislated on amicus curiae practice more than a decade ago under art 22(3)(c) of the Constitution of Kenya, promulgated on 27 August 2010,¹⁶⁹ and the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Rules, 2013.¹⁷⁰ Lastly, in its Constitutional Court Rules of 1995, South Africa legislated on amicus curiae practice nearly 30 years ago.¹⁷¹ In light of this, Uganda should surely have enacted the amicus curiae rules by now.

Secondly, while the Supreme Court's principles on amicus curiae admission outlined in *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others* provides guidance to lower courts on the fundamental considerations in amicus applications, it is critical that the courts elaborate on some of the principles, such as the test for determining the applicant's expertise to qualify as amicus and whether the applicant is biased or partisan.

It is argued that the majority of amicus applications have been rejected on these two grounds:¹⁷² the applicant's failure to demonstrate valuable expertise in order to qualify as amicus, and the applicant's failure to demonstrate that they are neutral or independent of the parties in the main case.

In the spirit of art 126 of the Constitution, the preferred course should be to take a liberal approach in which applicants are admitted as amicus curiae, subject to the condition that the court forestalls the extent of such submissions to ensure that they do not take sides.

¹⁶⁴ <<http://judiciary.go.ug/files/downloads/CJ%20SPEECH%20-%20AJC%202022.pdf>> 9.

¹⁶⁵ East African Court of Justice 'Registry/Rules of Procedure 2019' <https://www.eacj.org/?page_id=5722>.

¹⁶⁶ Established under s 9 of the Treaty for the Establishment of the East African Community, 1999.

¹⁶⁷ A regional inter-governmental organisation of six partner states. See <<https://www.eac.int/>>.

¹⁶⁸ This is now rule 59 of the East African Court of Justice Rules of Procedure, 2019, promulgated on 15 February 2019.

¹⁶⁹ Observed by the Supreme Court in *Re: Application for leave to intervene as Amicus Curiae by Prof. Oloka Onyango & 8 others* (note 119 above) 11. See also C Odote & L. Musumba *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* (2016) <<https://www.researchgate.net/publication/299471229>>.

¹⁷⁰ Legal Notice No 117 of 2013.

¹⁷¹ JC Mubangizi & C Mbazira 'Constructing the Amicus Curiae Procedure in Human Rights Litigation: What Can Uganda Learn from South Africa?' (2012) 16 *Law, Democracy and Development* 199.

¹⁷² Oloka-Onyango & Mbazira (note 117 above). For instance, *Re: Application for leave to intervene as amicus curiae by Foundation for Human Rights Initiative & 7 others* (note 116 above) was rejected on these grounds.

The courts should encourage the practice of requiring applicants to attach their intended amicus curiae brief so that the court can assess the scope of their intervention. Bias-based objections should be balanced against public interest and the assistance that the court is likely to receive from amicus curiae. This should be handled on a case-by-case basis.

Finally, the Supreme Court's principles on amicus curiae brief admission should not be construed as exhaustive. They should not be interpreted in such a way that they exclude other factors; rather, the courts should take a progressive approach that allows for modification of previously identified principles and the addition of new considerations.

This approach will encourage the systematic expansion of amicus curiae practice in Uganda and foster public interest litigation. Furthermore, the approach would be consistent with art 126(2)(e) of the Constitution, which enjoins courts to administer substantive justice without undue regard to technicalities.

5. Conclusion

The practice of filing amicus curiae briefs is gaining traction in Uganda. The jurisprudence on the subject has grown as a result of the Ugandan courts' progressive approach in considering amicus curiae applications in the last five years. Moreover, with the enactment of the draft Judicature (Amicus Curiae) Rules, the courts and litigants will have greater certainty about the practice and procedure on amicus curiae briefs thereby encouraging the practice. There is hope that amicus curiae briefs will take centre stage in efforts to increase public interest litigation and public participation in the administration of justice by the courts.

CHAPTER 5: The Amicus Curiae Context, Law and Practice in Malawi

Kumvana Mlumbé Mtukule

1. Introduction

The adoption of a democratic constitution in Malawi in 1994 ushered in a transformative legal system that has at its core a better disposed forum for challenging human rights and systematic social rights exclusions in the courts of Malawi.¹⁷³ The Bill of Rights in the 1994 Constitution created opportunities for litigation in human rights and it also created opportunities for the appearances of non-parties to civil disputes in the form of amicus curiae. This discussion seeks to explore the influence of the amicus curiae and its subsequent development in the Malawian jurisprudence. A good starting point would perhaps be an understanding of what an amicus curiae is. Beyond its literal meaning of a friend of the court, *Black's Law Dictionary* defines amicus curiae as a bystander, usually a counsellor who interposes and volunteers information upon some matter of law in regard to which the judge is doubtful or mistaken or upon a matter of which the court may take judicial cognizance.¹⁷⁴ This is the broadly recognised definition of what an amicus curiae is. However, the *Mellinkoff Dictionary* gives an extension to the description and states that an amicus curiae is someone who is not a party to the litigation but usually favouring one of the parties and is permitted to make an argument to the court.¹⁷⁵

A question would now be, who is really an amicus curiae before the Malawian courts? Is he/she a bystander who volunteers information to the court or is he/she, as Mellinkoff puts it, someone not a party to litigation proceedings but who favours one party and is allowed to make arguments before the court? As straight forward as this question looks, it is however difficult to provide a comprehensive definition of what an amicus curiae in practice is, since as an institution, its features and functions have varied according to time and practice.¹⁷⁶ In this chapter, we will discuss the various faces of an amicus curiae before Malawian courts. Through an analysis of cases where amicus curiae were admitted as friends of the Malawian courts the discussion also explores the extent to which an amicus curiae is actually the friend of the court in Malawi and also identifies gaps in the practice.

2. Historical Context of Amicus Curiae

Historically and at common law, amicus curiae was a term applied to a bystander who without having an interest, in the cause of his/her own knowledge, would make suggestions on a point of law or fact for the information of a presiding judge.¹⁷⁷ The amicus curiae did not have to be an attorney to intervene and the general attitude of the court was to welcome such aid. The common law amicus curiae was designed to be an agent of the court and his/her obligation was to pursue and defend a legal position at the request of the court.¹⁷⁸ He/she was an impartial friend of court whose obligation was only to the court.

¹⁷³ S Gloppen & F Edge Kanyongolo 'Courts and the poor in Malawi Economic marginalization, vulnerability, and the law' (2007) 5(2) *Int J of Constitutional Law* 258 <<https://academic.oup.com/icon/article/5/2/258/850104>>.

¹⁷⁴ H Campbell *Black's Law Dictionary* 2 ed (1910).

¹⁷⁵ D Mellinkoff *Dictionary of American Legal Usage* (1992) 27.

¹⁷⁶ K Fach Gomez 'The Role of Amicus Curiae in Investment Arbitration: How to Draw the Line Favourably for the Public Interest' (2012) 35 *Fordham Int LJ* 510.

¹⁷⁷ S Krislov 'The Amicus Curiae Brief: From Friend to Advocacy' (1963) 72 *The Yale LJ* 694.

¹⁷⁸ *Ibid.*

However, despite the impartiality, the amicus curiae was at times permitted to stray from this obligation to defend the interests of a party that is not a party to the law suit.¹⁷⁹ The continual straying of the obligation later evolved into acknowledging the amicus curiae no longer as just a bystander but a friend of court with his/her own interests. The amicus curiae no longer waited for an invitation to advise the court on points of law and fact but he/she could now actively obtain permission to participate in a lawsuit as a friend of court pursuing the interests of third parties. It can be said that the amicus curiae now adopted a litigant approach where his/her interests are carefully drafted not only to advance a position on a point of law or fact, but also to supplement and strengthen a position taken by a party to the proceedings should that position be in the interest of third parties.

The amicus curiae practice in Malawi mirrors to a large extent the evolved common law amicus curiae as well as the common law bystander who is invited by the court to participate in proceedings. Historically, there are not many records of amicus curiae applications before the adoption of the 1994 Constitution. Perhaps the reason for this could be that prior to this, the judiciary did not enjoy their independence. Given that a majority of amicus curiae applications are based on the concept of human rights, it is very doubtful that in the pre-1994 Constitution era, the judiciary had that much freedom to entertain, let alone invite, amicus curiae applications to offer their advice on the point of law. The High Court in Malawi however started receiving an increased number of amicus curiae applications post the adoption of the 1994 Constitution although the well-known recorded one was an application in the 2003 case of *Public Affairs Commission v Attorney General and another*.¹⁸⁰ This action was commenced against the amendment of s 65(1) of the Constitution. This section allowed the speaker of the National Assembly to declare vacant the seat of any member of that assembly if, on election he/she was a member of a political party represented in that assembly upon his/her voluntarily ceasing to be a member of that party and joining another political party also represented in the same assembly. The amendment provision provided that a seat will be declared vacant if a member of the National Assembly has voluntarily ceased to be a member of that party represented in the National Assembly or has joined any other political party, association or organisation whose objectives or activities are political in nature. The Malawi Human Rights Commission was admitted as amicus curiae and they asked the High Court to decide whether the amendment to s 65(1) of the Constitution is inconsistent with and in violation of the freedom of association provided under s 32 of the Constitution.¹⁸¹

3. Amicus in Practice

Up to the adoption of the 1994 Constitution, amicus curiae had been a rare phenomenon in Malawi and to date the only formal statutory basis to admit an amicus curiae is guided by order 19 of the Malawi High Court Civil Procedure Rules of 2017. Some principles have been determined from the limited case law which also has plenty of room for development. Under the 2017 High Court Civil Procedure Rules, 'any person interested in any matter' in a proceeding before the court may, with the permission of the court, be admitted as amicus curiae upon such terms and conditions as the court may determine.¹⁸² In practice, the 'any person interested in any matter' has generally been human rights institutions, local and international non-governmental organisations (NGOs) with a public interest agenda in the proceedings. It is also important to note that the most considered criteria is non- partisanship.

¹⁷⁹ Ibid 697.

¹⁸⁰ Civil Cause 1975 of 2003 [2003] MWHC 71.

¹⁸¹ Ibid.

¹⁸² Court (High Court) (Civil Procedure) Rules, 2017 order 19.

The Malawi jurisprudence, having originated from a closed up and careful pre-democracy era, is now a free ground for jurisprudence advancement and innovation. The provision is like an open-ended opportunity for institutions to use amicus curiae as an advocacy medium through which courts are made aware of public interests at stake. In Malawi, the amicus curiae has also been instrumental in setting new legal precedents and enforcement of innovative legal concepts in human rights law,¹⁸³ as well as securing the state's coherence with international law. The amicus curiae has been key to proceedings where institutions were able to advocate for principles and interpretations of law more extensively and freely than a legal practitioner representing a client would do.

In the case of *Gwanda v The State*,¹⁸⁴ for instance, the applicant, a street vendor by trade, was arrested under s 184(1)(c) of the Malawi Penal Code for the offence of rogue and vagabond on his way to sell his stock. Four institutions were admitted as amici curiae and they all presented arguments that coincided with those of the applicant. Apart from the respondent, no amicus curiae supported the maintenance of the law although the law was popular with the business community particularly in the urban areas as it was common knowledge that enforcement of the law gave them a sense of security.¹⁸⁵ One of the arguments brought forward by the amici curiae was how s 184(1)(c) of the Malawi Penal Code was unconstitutional as its ambiguities were used to the disadvantage of marginalised people. The amici curiae also argued on the role of constitutionalism in the rule of law. Through the extensive advice on constitutionalism and international human right law by the amici curiae, the court held that s 184(1)(c) of the Malawi Penal Code was unconstitutional and its application violated the applicant's constitutional right to dignity because it gave too much discretion to law enforcement and because the right to be presumed innocent was negated. The court further held that the applicant's right to freedom from inhuman and degrading treatment and punishment was violated in that he was arrested on unsubstantiated grounds and kept in custody for three days, an experience which is demeaning, traumatising and humiliating. The court also held that the application of s 184(1)(c) produced disproportionate results in many cases with respect to marginal groups.

Looking at the court's approach in the case of *Gwanda v The State* with a realist view, one cannot help but to observe that as much as the purpose of the amici curiae is to assist the court and not to become a party to the action, the main reason that amici curiae join proceedings that they are not a party to is because they have an interest in the issues at hand and the court has allowed the amici curiae to argue in favour of those interests. Taking in consideration the principle of non-partisanship, however, where there is an interest, it is most likely that arguments in submissions will tilt more to protect that interest. With a rising number of public interest cases in practice, is the common law notion of holding a non-partisan view in proceedings gradually becoming just a polite concept as there is less reluctance by courts to admit amicus with a clear position on the underlying legal issues in a proceeding? Regardless of the answer to this question, this advancement reflects a more realist view of the purpose of an amicus curiae in proceedings as far as public interest is concerned.¹⁸⁶

The Malawi courts have also admitted amicus curiae to represent the interests of a section of the public who are not a party to the proceedings. In the case of *Chilima and another v Mutharika and another*,¹⁸⁷ also known as the *Elections Case*, the court showed no reluctance in admitting amicus curiae whose view had a clear position to be in the interest of only a portion of the public who were not party to the case. In this case, the court considered the arguments and submissions

¹⁸³ A Wiik *Amicus Curiae before International Courts and Tribunals* 1 ed (2018).

¹⁸⁴ Constitutional Cause no 5 of 2015 [2017] MWHC 23.

¹⁸⁵ Ibid.

¹⁸⁶ Mccann Fitzgerald, *Commercial Court Affirms Legal Principles on Admission of an Amicus Curiae*, 2016 accessed at <https://www.com/knowledge/disputes/commercial-court-affirms-legal-principles-on-admission-of-an-amicus-curiae>

of the amicus curiae to have been of much assistance to the court in arriving at its decision. The court also emphasised that the critical role that amicus curiae play in public interest litigation is to seek to highlight some of the important considerations necessary for the determination of the court which the parties might have neglected to address or to properly address. The amicus curiae in the proceedings was the Women Lawyers Association of Malawi whose mission is to champion for women's rights. In their application to be admitted as amicus curiae, they stated that the majority of the people who voted in the disputed elections were women and that it sought to highlight some of the gender aspects relating to the electoral dispute. However the court did not elaborate in its ruling how exactly it benefitted from or what gender concepts from the submissions did help it to arrive to its decision.

However, despite having a provision in the Malawi High Court Civil Procedure Rules that gives liberty to institutions to join proceedings as amicus curiae, the practice in courts has shown that it is not enough for institutions to only hold an interest in the proceedings for them to be granted an audience before the courts. Before an amicus curiae admission, there is a need for the court to be satisfied that the conditions set in the 2017 High Court Civil Procedure Rules have been met. Under these rules, for an application to be admitted as amicus curiae, it needs to briefly (a) describe the interest of the amicus curiae in the proceedings, (b) identify the position to be taken by the amicus curiae in the proceedings and (c) set out the arguments to be advanced by the amicus curiae. In addition to this, the court also expects to see the relevance of the amicus curiae to the proceedings and the reasons for believing that the arguments will be useful to the court.¹⁸⁹

The High Court in Malawi has been keen to encourage the participation of amicus curiae in proceedings by extending invitations to interested institutions with expertise on the issue(s) before the court or by admitting a large percentage of amicus curiae applications. The practice has been that where the court has invited friends of court, there is an assumption that they will be admitted automatically. However, parties to the proceedings can object to the admission of amicus curiae after being served with the application mostly on the basis of expertise and relevance. The basis of this practice can be traced to its common law background as it is not in the civil procedure regulations guiding the amicus curiae practice. Accordingly, parties to proceedings have exercised their liberty of objecting to the participation of amicus curiae in proceedings much more often than the court itself. An objection to admission of an amicus curiae has in the past varied from the amicus curiae having not satisfied the requirements to the question as to whether the arguments brought by the amicus curiae are relevant and will be useful to the proceedings. Despite this, the court has retained the discretion of admitting amicus in spite of objections from any of the parties. In the case of *R v Minister of Justice and Constitutional Affairs & others (Ex parte Kammasamba and others)*¹⁹⁰ the applicants opposed the application of two civil society organisations as amici curiae on the basis that what the two organisations submitted was not going to add value to the case. In dismissing the opposition and admitting the amicus, the court stated that the two human rights organisations would add value and bring immense wealth to the jurisprudence of constitutionalism and human rights in the country.

Parties to proceedings have also raised objections to admission of amicus curiae based on the amicus's failure to comply with procedure. In the case of *AJ (A minor) v The State and The Inspector General of Police and The Attorney General Ex parte Stanford Siliro Shaba on behalf*

¹⁸⁷ Constitutional Reference 1 of 2019 [2020] MWHC 2.

¹⁸⁸ Courts (High Court) (Civil Procedure) Rules 2017 order 19, rule 10.

¹⁸⁹ Ibid.

¹⁹⁰ [2016] MWHC 503. The applicants filed inter partes summons for continuation of the injunction on suspending the moratorium that the government had issued which froze the operation of laws that criminalises gay and lesbian sexual practices.

of *TS (A minor)*,¹⁹¹ two minors charged with defilement were challenging the constitutionality of s 138(1) of the Malawi Penal Code which criminalises sexual relations between minors, especially the boy child. The respondents were objecting the admission of amici curiae which included two foreign amici. Although the court indicated that parties to proceedings are entitled to object an admission of amicus curiae, the court emphasised that such objections are a factor to be taken into consideration but it is not the determining factor.¹⁹²

The courts in Malawi have also exercised the discretion to disregard submissions by an amicus curiae and, further, give a direction on what the amicus curiae ought to have concentrated on. In the case of *The Registered Trustees of the Public Affairs Committee v The Attorney General and the Speaker of the National Assembly*,¹⁹³ the court stated that what the amicus curiae submitted was not going to be very useful in the determination of the issue of locus standi. The court directed that the arguments ought to have concentrated on locus standi and it could have been more helpful if they had been geared towards throwing light on the question whether or not the plaintiff in the matter had a right to represent the case in court.

Although the Malawi High Court Civil Procedure Rules are silent on the issue of impartiality of amicus curiae, in practice such submissions are required to show impartiality. Impartiality was adopted from the common law practice. However, just like the evolved common law amicus curiae, the courts in Malawi have allowed the amicus to stray from the common law obligation of an impartial bystander and adopt that of a litigant with interest and has admitted arguments that align with a party's position in proceedings. An example of this is the case of *Gwanda v The State*, whereby all four amici curiae admitted in the proceedings submitted arguments that coincided with the applicant.¹⁹⁴ However, even though amicus curiae are allowed to take a position or invite the court to take into consideration a certain position, as a common law principle amici curiae are expected to be impartial.

As far as relevance to proceedings is concerned, the court has extended the statutory rule to common law practice and has considered potential contributions to the jurisprudence on constitutionalism and human rights by the amicus curiae as well as expertise of the amicus curiae as a condition for admission. In the case of *R v Minister of Justice and Constitutional Affairs & others (Ex parte Kammasamba & Others)*,¹⁹⁵ the applicants who were human rights NGOs were admitted as amici curiae on the basis that they will bring immense wealth to the jurisprudence of constitutionalism and human rights due to their knowledge on issues of human rights and their exposure to international standards. In the case of *Re: The Adoption of Children Act CAP 26:01, In Re CJA Female Infant*¹⁹⁶ the court also considered the expertise of an amicus as a condition for admission in the case.

4. The Future of Amicus in Malawi

The participation of amicus curiae in litigation has recently gained great credence before the courts in Malawi, with the courts more keen to admit amici to proceedings and in some cases the courts have even sent out invitations for interested parties to join as amici. With a rising number of individuals and organisations interested to join proceedings as amici in the recent years, the Malawi jurisprudence stands to benefit from quality of judgments especially in human rights litigation. This is because the institution of amicus curiae has proven to have the extraordinary potential of building a wealth of jurisprudence in public law.

¹⁹¹ Constitutional Case Numbers 4 and 5 of 2021.

¹⁹² Ibid.

¹⁹³ Civil Cause No 1861 of 2003 [2003] MWHC 71.

¹⁹⁴ Note 184 above.

¹⁹⁵ Note 190 above.

¹⁹⁶ 9 MSCA Adoption Appeal 28 of 2009 [2009] MWSC 1.

Although to date there has been quite a number of cases where amicus curiae were admitted, there is still however a void in the jurisprudence in the sense that in the cases where amicus curiae had intervened, it is not clear or it is not elaborated extensively as to how the court had benefitted from that intervention. In a number of cases, the dicta only mentions why amicus curiae wanted to be admitted but in the holdings, considerations to the role is often silent. In a number of cases, the court simply extends gratitude to the assistance rendered by the amicus curiae but it does not elaborate the extent to which they have relied on the submissions to arrive at its decision.

The amicus curiae practice has evolved so much from its historical background of a bystander whose influence to the final determination of proceedings was little to none. The court has now found itself in an era where human rights issues are endlessly being litigated and courts are being confronted more and more by complicated human rights cases that are seeking innovative techniques to solve these problems¹⁹⁷. The amicus curiae, usually an expert in issues being determined by the court actively offering a wealth of information and legal positions to the courts, cannot be more relevant at this time.

Although not a typical feature of the amicus curiae, considering the evolution and resilience of their participation in proceedings, there is room for courts in Malawi to embrace a more flexible, adaptable and progressive approach where information offered by the amicus curiae is not considered as bystanders' contributions but rather be perceived as potential contribution to the much needed jurisprudence and, if applicable and necessary, their views could be adopted in the dictum and also be part of the courts' findings. The courts in Malawi has already taken advance steps compared to other jurisdictions in adopting the evolved amicus curiae with clear interest and enabling them to join the proceedings to supplement arguments by one party for the benefit of third parties.¹⁹⁸

If it were to be flexible, the High Court will not be chartering in uncharted waters as in other jurisdictions like the United States of America (US), Kenya and South Africa, the courts in a number of cases have ceremoniously taken the bold step and based judgments on the views raised by amicus curiae.¹⁹⁹ For example, in the case of *Mapp v Ohio*²⁰⁰ the US Supreme Court adopted the course suggested by the amicus curiae, overruled its previous decision and held, as urged by the amicus curiae, that the rule prohibiting the admissibility of illegally obtained evidence must be applied in relation to both state governments and the federal government.

An example from Kenya is *Mitu-Bell Welfare v Kenyan Airports Authority and another*,²⁰¹ a case brought by the Mitu-Bell Welfare Society seeking declaratory reliefs and compensation for the eviction of over 15,000 people from land adjacent to the Wilson Airport in Nairobi. The Initiative for Strategic Litigation in Africa was admitted in the proceedings as amicus curiae to make submissions on the meaning of the right to remedy in the context of human rights violations and how human rights remedies have evolved. The court discussed the submissions of the amicus, agreed with the specific points that the amicus had raised and adopted them in arriving at its decision.

The traditional conception of amicus curiae has also undergone a radical evolution in South Africa where an amicus plays a formal role in litigation and has been assigned very diverse and dynamic roles in assisting the courts to reach appropriate decisions, although it is not very clear

¹⁹⁷ O Jonas 'The Participation of the *Amicus Curiae* Institution in Human Rights Litigation in Botswana and South Africa: A Tale of Two Jurisdictions' (2015) 59(2) J of African Law 329.

¹⁹⁸ See *Gwada v The State* (note 184 above).

¹⁹⁹ Jonas (note 197 above).

²⁰⁰ 367 US 643 (1961).

²⁰¹ Petition number 3 of 2018 [2021] eKLR.

to what extent the courts in South Africa have relied on the views of amicus curiae.²⁰² However the role of amicus curiae in litigation in South Africa has been formalised both by dicta and by legislative enactments. For example in the case of *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and others*²⁰³ the Constitutional Court, overruling the earlier decision of the High Court, held that rule 16A of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa was wide enough to allow amicus curiae to present evidence before the High Court for decision. The court reasoned that the arguments advanced by amicus curiae are usually based on a broad matrix of considerations compared to those submitted by parties to the proceedings and such submissions will usually be premised on facts and evidence not before the court including statistics and research and that it would make a little sense to allow the presentation of bare submissions unsupported by any facts.²⁰⁴

From the above discussion, the courts in Malawi have a wide area of adaptability. The High Court has already taken some bold steps in the practice of amicus curiae, however, like its counterparts in other jurisdictions, the court can take further bold steps in adopting amici's views in its decisions. The courts can also move a step further forward by acknowledging the wealth of knowledge shared by the amicus curiae and showing gratitude to amici's submissions by discussing extensively the points that the amicus curiae has made and explaining how it influenced its ruling.

5. Conclusion

In conclusion, the amicus curiae practice in Malawi historically has not departed far from the common law practice of a friend of court. However, there has been advancement in the practice in that amicus curiae is now being used as a device of assuring coherence with international law by the state as well as a tool for advocating novel principles and interpretations of law. Having said that there is still some room for improvement where the court can adopt a more flexible approach and allow themselves to be influenced by the views of amicus curiae by adopting such views in its decisions. The rationale for the participation of amicus curiae in proceedings and the quality of their briefs lies in the potential to develop the law. The participation of amicus curiae in litigation can greatly contribute to the advancement of human rights jurisprudence as well as enhancing states' adherence to international law and also the promotion and protection of human rights.

²⁰² [2012] ZACC 25.

²⁰³ Ibid 22.

²⁰⁴ Ibid 22

CHAPTER 6: The Amicus Curiae Context, Law and Practice in Nigeria

Abigail Osiki and Vincent Oniga

1. Introduction

The participation of amicus curiae in litigation is entrenched in many domestic courts and international legal tribunals. In some jurisdictions, this participation is engrained in domestic procedural laws with guidelines on application clearly provided. In others, there are no clear rules or guidelines governing the practice and procedure of amicus curiae. Nonetheless, approaches to amicus curiae have implications for advancement of a country's jurisprudence particularly in relation to the normative framework of human rights. Therefore, this chapter attempts to explore the practice and procedure of the use of amicus curiae in Nigeria.

This article begins with a brief exploration of the historical context of amicus curiae in Nigeria which is argued to be linked to the colonial roots of the country. While highlighting the lack of substantive law or procedural rules regulating amicus curiae, the main argument in this article is that Nigerian courts have been more receptive to amicus curiae that are specifically invited by the courts to participate in proceedings. Furthermore, this has mainly been done by the Supreme Court which is the highest court and whose decisions are binding on all other courts. It is therefore concluded that the practice and procedure of Nigeria still needs to be developed particularly in relation to women's rights.

2. Historical Context

Although amicus curiae is recognised under Nigerian law, its precise origin is unclear. However, the institution of amicus curiae can arguably be traced to the common law roots of the country. In early English common law, it was an accepted practice that third parties could step forward as an amicus curiae to advise the court on any unfamiliar legal or factual issue.²⁰⁵ For example, in 1468, the court noted that 'any man can inform the court in the case so that the court will not render judgement on an insufficient record'.²⁰⁶ Similar references can also be found in a 1573 abridgement and numerous cases where third parties intervened in court proceedings to call attention to irregularities in court processes, relevant statutes and the death of a party in the proceedings.²⁰⁷ This practice has since developed and spread beyond the United Kingdom to many common law jurisdictions including Nigeria.

In Nigeria there are no legislative provisions governing the amicus curiae procedure. Nonetheless, the first formal reference to amicus curiae intervention in judicial proceedings can be traced to the Fundamental Rights (Enforcement Procedure) Rules 1979, which came into force on 1 January 1980.²⁰⁸ Order 5 of these rules provided as follows: 'any person or body who desires to be heard in respect of any application, motion or summons, under these Rules, and appears to the Courts or Judge to be the proper person or body to be heard, shall be heard notwithstanding that he

²⁰⁵ S Chandra Mohan 'The Amicus Curiae: Friends No More' (2010) *Singapore J of Legal Studies* 352.

²⁰⁶ FM Covey Jr 'Amicus Curiae: Friend of the Court' (1959) 9(1) *DePaul LR* 30, 33.

²⁰⁷ See generally, K Samuel 'The Amicus Curiae Brief: From Friendship to Advocacy' (1962) 72 *The Yale LJ* 694; V Charles A *General Abridgement of Law and Equity: Alphabetically Digested Under Proper Titles, with Notes and References to the Whole*. Vol 17 (1743).

²⁰⁸ These rules are procedural law and were formulated by the Chief Justice of Nigeria in terms of s 46(3) of the Constitution to develop the practice and procedure for courts to give effect to the fundamental rights provided in chapter IV of the Constitution.

or it has not been served with the copy of the application, motion or summons'.²⁰⁹ This provision was argued to give the status of *amicus curiae* to practically every Nigerian who desired to be heard in any application relating to fundamental human rights.²¹⁰ However, this was amended in the Fundamental Rights (Enforcement Procedure) Rules 2009, where order XIII(1) provides 'any person or body who desires to be heard in respect of any Human Rights Application and who appears to the Court to be a proper party to be heard, may be heard whether or not the party has been served with any of the relevant processes, and whether or not the party has any interest in the matter'. This variation introduces a wider scope and potentially a pathway for an *amicus curiae* in stating that to appear in any human rights proceedings, the party does not need to have any interest in the matter. However, the decision of the Court of Appeal in *KMC Chain Industrial Company Nigeria Limited v Akebono Industrial Company Nigeria Limited and others* seem to suggest that the 'category of person who may be heard under order XIII rule 1 is different from *Amici Curiae*'.²¹¹ Consequently, the first explicit reference to an *amicus curiae* is found in rule 2 of order XIII of the Fundamental Rights (Enforcement Procedure) Rules 2009 which provides 'amici curiae may be encouraged in human rights applications and may be heard at any time if the court's business allows it'. Within the context of this rule, the intervention of an *amicus curiae* is subject to the convenience of the court. For example, in a recent call for the intervention of amici curiae in relation to the continued detention of an applicant by the State Security Services, the Federal Territory High Court ruled that the allowance of an *amicus curiae* in a judicial proceeding is discretionary.²¹²

There are two broad ways for an *amicus curiae* to participate in court proceedings in Nigeria. First, the courts have the ability to invite or appoint an *amicus curiae* to participate in their proceedings by presenting law or fact. Within this context, these amici are usually senior or eminent legal practitioners including academics. This is the most prevalent form of *amicus curiae* used in the Nigerian litigation system.²¹³ In *Atake v Afejuku*, the court stated 'every court has an inherent power to invite barristers and/or solicitors of considerable experience to appear before it to assist in the proper administration of justice when important issues of law or fact are being considered'.²¹⁴ Second, parties can invite an *amicus curiae* to address certain issues or non-governmental organisations (NGOs) can file *amicus curiae* briefs before the court. However, this must be done with the leave of the court.

3. Case Law

Although a veritable tool for determining questions of law or facts, there is nothing on the procedure for *amicus curiae* in the civil procedure rules or any other rules of court. Instead, the general practice is that *amicus curiae* briefs are filed in the same manner as other briefs in compliance with rules of the relevant court. Furthermore, the filing of *amicus curiae* briefs can be done in any subject matter and has been used in plethora of cases in Nigeria from questions around the validity of a law to issues around human rights. However, it should be noted that no record was found of the use of *amicus curiae* at the Supreme Court on matters related to women's rights or the advancement of sexual rights.

²⁰⁹ Fundamental Rights (Enforcement Procedure) Rules 1979 (commenced 1 January 1980) <<https://gazettes.africa/archive/ng/1979/ng-government-gazette-supplement-dated-1979-12-20-no-64-part-b.pdf>>.

²¹⁰ P Nnaemeka-Agu 'The Role of Lawyers in the Protection and Advancement of Human Rights' (1992) 18 *Commonwealth L Bulletin* 734, 744.

²¹¹ (2018) LPELR-43934 (CA).

²¹² Channels Television 'Court Declines Dasuki's Request For "Amicus Curiae" In His Trial' (19 February 2019) <<https://www.channelstv.com/2019/02/19/court-declines-dasukis-request-for-amicus-curiae-in-his-trial/>>.

²¹³ See *Zabadne v Shinco (Nig) Ltd & Another* (2021) LPELR-55152 (CA) 25–26; *Garuba Abioye & 4 Others v Sa'Adu Yakubu & 5 Others* (1991) 5 NWLR (Pt 190) 130–256. In *Peenok Investments Ltd v Hotel Presidential Ltd* (1982) 12 SC 1, the Supreme Court condemned the Attorney Generals of two states for honouring its invitation to appear as amici curiae.

²¹⁴ (1994) 9 NWLR (Pt 368) 379, 410.

Amicus curiae briefs have helped the courts to clarify the law-making powers of different spheres of government. In *Attorney-General of Ogun State v Alhaja Aberuagba and others*,²¹⁵ the respondent, a wholesale purchaser of beer in Ogun State, instituted an action for themselves and on behalf of wholesale purchasers in the state claiming against the Ogun state government for a declaration that certain sections of the Sales Tax Law 1982 were inconsistent with the provisions of the Constitution. The issues for determination before the Supreme Court included the determination of the validity of the Sales Tax Law, whether its enactment falls within the exclusive legislative list and whether the tax imposed by this law falls within the exclusive legislative list, among others.²¹⁶ The Supreme Court invited all the Attorneys-General (AG) in the federation as amici curiae to file briefs of argument on the issues for determination before the court. The majority of the amici curiae (nine AGs) joined issues on the side of the appellant while the AGs of the federation and Oyo State supported the respondent. After hearing the arguments from all AGs, the Supreme Court held that the Sales Tax Law was partly unconstitutional to the extent that the law imposed sales tax on inter-state trade and commerce and other taxable goods which are in the Exclusive Legislative List.²¹⁷ Furthermore, this law was held to be an exercise of power to the extent that it imposed sales tax on interstate trade and commerce. In doing this, the court accepted in parts the arguments of amici curiae both on the sides of the appellants and the respondent. Consequently, the appeal succeeded and failed in part.

Besides the above case, there are numerous cases where the Supreme Court invited amicus curiae to address it on specific issues. These cases include *FBN v Maiwada*,²¹⁸ where the full panel of the Supreme Court invited 11 senior advocates as amici curiae to address it on whether a law firm could sign court processes; *Ogugu v State*,²¹⁹ where the court invited the amici curiae to address it on the constitutional right to life and *Centre for Oil Pollution Watch v NNPC*, where the court invited the amici curiae to address it on the extension of the scope of locus standi in issues of environmental degradation to NGOs.²²⁰ In all these cases, the court attached great value to the amici curiae briefs and engaged with several of the arguments indicating the importance and relevance of this method of participation.

In *Joy Moses v The Minister, Federal Capital Territory (FCT) and others*,²²¹ a case where the amici curiae filed briefs on a voluntary basis for the court's consideration, the applicant was challenging the violation of her constitutional rights to fair hearing, freedom of movement, freedom of association and freedom from discrimination based on sex, among others in terms of ss 34, 35, 36, 40, 41 and 42 of the 1999 Constitution of Nigeria (as amended). The court, while noting that the practice of filing amicus briefs has evolved and is now widely accepted in human rights action, held that one of the amicus, Lawyers Alert Initiative, was not invited nor granted leave as amicus to address the court on the issues before it. Consequently, the amicus curiae brief filed by Lawyers Alert Initiative was struck out. This made the United Nation Human Rights Council's Working Group on Discrimination against Women and Girls (WGDWG) and Working Group on Arbitrary Detention (WGAD) the only amici curiae. They advanced submissions which addressed the disproportionate impact of vague domestic laws on the human rights of sex workers who are mostly women, the discriminatory impact of the criminalisation of sex work on women, the relevant international framework as well as the universal nature of human rights and its application to everyone. More importantly, they argued that these violations of the rights of the applicant were gendered and based on patriarchal moral standards about women's sexuality. However, these submissions were not taken into consideration by the court

²¹⁵ (1985) 1 NWLR (Pt 3) 395.

²¹⁶ Ibid iv.

²¹⁷ Ibid 48 to 55.

²¹⁸ (2013) 5 NWLR (Pt 1348) 444.

²¹⁹ (1994) 9 NWLR (Pt 366) 1.

²²⁰ (2018) LPELR-50830 (SC).

²²¹ Suit No GHC/ABJ/CS/975/2019. Judgment was given on 5 August 2021.

in its judgment. The court declared that the constitutional rights of the applicant were violated without acknowledging the gender dimensions of these violations as submitted by the amicus.

Similarly, there are other cases where amicus curiae briefs were filed voluntarily by mainly international organisations with respect to the rights of women at the Federal High Court of Nigeria. These include *Blessing Sam & 5 others v The Minister, FCT & 13 others*,²²² *Loveth Iyoko & 5 others v The Minister, FCT & 13 others*²²³ and *Mirabel Ibe & 5 others v The Minister, FCT & 13 others*.²²⁴ However, in all these cases, while the court acknowledged the submissions of the amici, these were not taken into consideration in the judgments. In summary, an evaluation of case law in Nigeria suggests that more credence is given to amicus briefs if the submission is at the instance of specific invitation by the court.

4. Future of Amicus Curiae

One of the major challenges to the participation of amicus curiae in Nigeria is the lack of adjectival law and clear rules governing their participation. In addition, as reflected in section 2 above, even in the Fundamental Rights (Enforcement Procedure) Rules 2009 where an amicus is mentioned, the court still has the discretion to either accept or reject amicus curiae applications without any obligation to first consider the merit of such an application before striking it out. This has implications for the growth of Nigeria's jurisprudence and quality of judicial rulings that would be realised from the interventions of the various amici. Furthermore, considering the patriarchal context of Nigeria, these limitations are an hinderance to facilitating systemic changes as it affects women's rights and sexual rights. Therefore, it is imperative that a law be developed which sets out a comprehensive list of requirements that a person or entity should meet before admission as an amicus curiae.

Having a clear procedure for amicus curiae is important to facilitate access to justice for the vulnerable. In Nigeria, access to justice remains a challenge particularly for vulnerable and marginalised groups. This is primarily caused by poverty which makes it hard for many Nigerians to access legal services and meet the costs related to accessing justice such as court fees and transport to and from court.²²⁵ As a result of this, many suffer the violation of their rights without any redress. However, in some countries including South Africa, the filing of amicus curiae briefs by NGOs has been used to bring the interests of the poor to the forefront in legal matters.²²⁶ This can also be replicated in Nigeria and the practice and procedure of amicus curiae used to close the gaps related to limited access to justice.

As stated above, the prevalent practice for an amicus curiae to participate in judicial proceedings is through invitation by the court. Another, more uncommon, practice is for the amicus curiae to voluntarily file a brief and address the court on certain issues. However, the power to listen to such voluntary submissions lie solely with the court. The implication is that these practices narrow the opportunities of the court to benefit from the expertise of individual professionals and institutions/organisations, particularly regarding human rights issues. Therefore, there is a need for a more liberal approach to the amicus curiae procedure.

It is also important to stress that rules of procedure should state that an intending amicus curiae must first be heard by the court before a final decision is made on whether to admit the amicus.

²²² Suit No GHC/ABJ/CS/970/2019.

²²³ Suit No GHC/ABJ/CS/974/2019.

²²⁴ Suit No GHC/ABJ/CS/972/2019.

²²⁵ I Igwe-Onyebuchi & A Bassey 'Review of the Impacts of Poverty on Access to Justice in Nigeria' (2021) 12(2) *Nnamdi Azikiwe Univ J of Int Law and Jurisprudence* 187.

²²⁶ JC Mubangizi & C Mbazira 'Constructing the Amicus Curiae Procedure in Human Rights Litigation: What Can Uganda Learn from South Africa' (2012) 16 *Law Democracy & Development* 199.

Within this context, academics have a role to play in the improvement of the law and practice of amicus curiae in Nigeria. Generally, legal and non-legal academics have made substantial contributions to the development of different areas of law in Nigeria. For example, the traditional approach to locus standi as decided in *Adesanya v President of the Federal Republic of Nigeria*²²⁷ was abandoned in cases involving the enforcement of human rights in the public interest after numerous academic commentaries criticising the prevailing narrowly-tailored rules.²²⁸ However, unlike the issue of locus standi, there is minimal academic jurisprudence on the subject of amicus curiae despite its importance in aiding the court's understanding of the normative framework of human rights especially on women's rights and sexual rights. Therefore, there is a need for more academic engagement on the subject of amicus curiae to promote coherent change of the current practice of amicus and further engrain it in the Nigerian legal system.

5. Conclusion

This chapter explored the practice and procedure of amicus curiae in Nigeria. It observed that there is no clear law or civil procedure rules governing the practice of amicus. Furthermore, the article found that the prevalent form of participation of amicus in judicial proceedings is through specific invitation by the court to senior members of the legal profession. This right of invitation is mainly exercised by the Supreme Court of Nigeria. However, this has the effect of limiting the opportunities of the court to benefit from the expertise of individuals and relevant organisations. It has also led to a situation where less weight is placed on amici briefs filed voluntarily. This is a barrier to the advancement of human rights standard particularly for vulnerable members of the society. Consequently, there is need for a more liberal approach to the participation of amicus in Nigeria to ensure the development of the country's jurisprudence and the promotion of human rights.

²²⁷ (1981) 1 All NLR 1.

²²⁸ TI Ogowewo 'The Problem with Standing to Sue in Nigeria' (1995) 39(1) J of African Law 1; EA Taiwo 'Enforcement of Fundamental Rights and the Standing Rules under the Nigerian Constitution: A Need for a More Liberal Provision' (2009) 9(2) African HR LJ 546. See also the Preamble at para 3(e) of the Fundamental Rights (Enforcement Procedure) Rules 2009.

CHAPTER 7: The Practice of Amicus Curiae in Africa: The Case of Burkina Faso

Arianne Gouem and Annick Imboua-Niava

1. Introduction

In the etymological sense, the amicus curiae is considered a 'friend of the court'. This Latin expression seems reassuring in the sense that a friend is generally benevolent.

The role of amicus curiae is often confused with that of an intervener. However, amicus curiae technically refers to a person who is not a party to the litigation, nor a witness, nor a court officer. It is a third party who intervenes in a proceeding, either orally or in writing, either on his or her own motion or at the request of the relevant court, to shed light on a given issue. The amicus curiae differs from the intervener who is a party to the proceedings. The intervener has an interest in the proceedings. An intervener can make personal claims and the court can order against the intervener.

The amicus curiae is usually a person or group with a reputation for specialisation in an area of law. Whether or not the amicus curiae intervenes on his or her own motion, it must be authorised by the court. Amicus curiae is widely used in common law countries and in the practice of international jurisdictions, particularly those relating to human rights.²²⁹ However, it remains unrecognised in the judicial system of Burkina Faso. The admission of the amicus curiae in certain countries²³⁰ and before certain international bodies has led to positive echoes which should prompt the Burkinabe legislator to reform its intervention before the national courts. The historical evolution of the concept is quite telling in this sense.

2. Background

An ancient Roman practice allowed third parties to intervene as independent advisors at the request of the court to shed light on facts or issues unfamiliar to the court.²³¹ One could thus assume that amicus curiae has a Roman origin, not only by the use of Latin but also by its meaning or definition.

In the 17th century, the mechanism was adopted in England and then developed as a practice, becoming a standard concept in the common law system and in international institutions today. The evolution of amicus curiae varies considerably from one country to another. For example, in the United States of America, the Supreme Court allowed the development of amicus curiae in the early 19th century, thanks to its adaptive policy to amicus briefs.²³² Similarly, before the European Commission, institutions are authorised to intervene voluntarily in a procedure on matters that concern them directly.²³³

²²⁹ *Umuhoza v Rwanda* (APPLICATION NO. 003/2014) AFCHPR 5 (2018) (The African Court on Human and Peoples' Rights granted amicus curiae in the proceedings of this case in 2016. Proceedings may be found at 1 RJCA 575).

²³⁰ Such as the United States of America, Canada and France.

²³¹ I Izarova, B Szolc-Nartowski & A Kavtun 'Amicus Curiae: Origin, Worldwide Experience and Suggestions for East European Countries' (2019) 60(1) Hungarian J of Legal Studies 18 <<https://akjournals.com/view/journals/2052/60/1/article-p18.xml>>.

²³² Ibid.

²³³ Treaty Establishing the European Community (Consolidated Version), Rome Treaty (adopted 25 March 1957) European Union (Consolidated version as amended by the Treaty of Lisbon) art 194; Protocol (No 3) on the statute of the Court of Justice of the European Union (18 April 1951) European Union, Court of Justice of the European Union (the Statute) art 56.

Historically, the intervention of the *amicus curiae*, which is more easily recognised in common law countries or before international courts or authorities, is not recognised in civil law jurisdictions such as Burkina Faso. In fact, Burkina Faso's domestic law does not provide for the intervention of the *amicus curiae* in legal proceedings.

However, in France, also a civil law legal system, the intervention of the *amicus curiae* was admitted for the first time by the Court of Appeal of Paris in two successive judgments in which the court decided, among other things, that 'as he was neither a witness nor an expert, he was not subject to the rules of the new Civil Procedure Code relating to recusal'.²³⁴ The court's reasoning was expressed as follows:

why not allow, by regulation if necessary, the intervention of privileged consultants, personalities of unquestionable competence and great moral authority who, after having attended the entirety of the proceedings, would give the court their opinion on the action to be taken on a decision of any kind. This should of course be done in the full light of day during the hearing and with respect for the adversarial process. In this way, the judges would be better informed of the consequences of their decision and could therefore concern themselves with the consequences of their decisions.²³⁵

The institution of *amicus curiae* has been more positively received by international human rights courts.

The European Court of Human Rights (ECHR), after an inauspicious start, in 1981 admitted the participation of non-governmental organisations (NGOs) in proceedings.²³⁶ Accordingly, a representative of the Trade Union Congress (TUC) was allowed to make an oral presentation on the basis of rule 38(1) of the ECHR's Rules. This case highlighted the need to clarify the legal basis for the participation of third parties, and more specifically *amici curiae*, in proceedings pending before the court. The response took the form of an amendment to art 37(2) of the Rules of Court allowing for third party submissions to the proceedings. Currently, this opportunity is expressly provided for in art 36(3) of the European Convention on Human Rights,²³⁷ as well as in art 44(2) (a) of the Rules of Court.²³⁸ These changes have encouraged the participation of *amicus curiae* in a number of cases. The ECHR however has the discretion to set out conditions for intervening, for example, on what matters the third party may make intervention, specific matters that are prohibited for intervention and the length of the submissions.²³⁹ These conditions are determined by the ECHR on a case-by-case basis where the court determines whether the intervention is 'duly reasoned'.²⁴⁰ The participation of *amicus curiae* in the ECHR has positively contributed to the dominant understandings of international law in a global age where international courts and societal actors are shaping the direction of rights protection.²⁴¹

Conceptually, the ECHR appears to view *amicus curiae* as assistants to the proceedings rather than as advocates to supplement the parties' arguments.

²³⁴ R de Munagorri 'L'ouverture de la Cour de cassation aux amici curiae' RTDCiv.: Revue trimestrielle de droit civil, Dalloz (2005) 88-93. halshs-01889467.

²³⁵ P Draï 'Le monde des affaires et ses juges' RJ com 1990 329 spéc 333.

²³⁶ *Young, James and Webster v United Kingdom* [1981] ECHR 4.

²³⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (1950, Council of Europe Treaty Series 005).

²³⁸ Rules of the Court (17 March 2022) ECHR.

²³⁹ ECHR 'Third Party Intervention before the European Court' <<https://www.echr.am/en/functions/representation/third-party-intervention.html#:~:text=A%20third%20party%20intervention%20is,to%20intervene%20in%20the%20proceedings>>.

²⁴⁰ Note 237 above art 44(3).

²⁴¹ RA Cichowski 'The European Court of Human Rights, Amicus Curiae, and Violence against Women' (2016) 50(4) Law & Society Review 890 <<http://www.jstor.org/stable/44122548>>.

The Inter-American Court of Human Rights (IACHR), as opposed to the ECHR, has not expressly provided for amicus curiae in its normative framework. However, it has accepted amicus curiae briefs from the time of its first advisory opinion²⁴² request despite the fact that nearly all its members are nationals from countries adhering to the civil law system.²⁴³ The IACHR has continued to accept amicus curiae briefs in the same way from renowned international human rights NGOs over the years who approach the court under the authority provided by art 64(1) of the America Convention on Human Rights.²⁴⁴ The IACHR later broadened its practice by accepting a brief on an advisory opinion request from an unaffiliated professor of law.²⁴⁵ The IACHR particularly benefits from the admission of amicus curiae briefs elaborately shedding light on complex human rights questions as it appears that the court is served by a very lean staff body and has not yet developed a first-class library.

The African Commission on Human and Peoples' Rights, on the other hand, expressly provides for the admission of amicus curiae in rules 104 and 105 of its 2020 Rules of Procedure.

The admission of amicus curiae by courts and tribunals specialising in human rights has given rise to abundant jurisprudence in the area of women's rights that could inspire countries like Burkina Faso that have remained on the side-lines of this movement.

3. Case Law

As stated above the intervention of the amicus curiae is not recognised by the courts of Burkina Faso. Consequently, there are no decisions rendered by Burkina Faso courts regarding amicus curiae. However, we may point to decisions from regional, international or arbitral jurisdictions.

In Africa, there are three major cases that advance the practice on the African continent: *Biwater Gauff (Tanzania) Ltd v Tanzania*,²⁴⁶ *Piero Foresti, Laura de Carli & Others v South Africa*²⁴⁷ and *Bernhard von Pezold and Others v Zimbabwe*.²⁴⁸

At the International Centre for Settlement of Investment Disputes (ICSID), there have been significant developments regarding the admission of amicus curiae. The rulings of 19 May 2005 and 17 March 2006 in *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A v the Argentine Republic*²⁴⁹ and *Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua S.A. v the Argentine Republic*²⁵⁰ were the first ICSID tribunal decisions admitting such a possibility. Two further decisions have been issued in the same vein, the 2 February 2007 order in *Biwater Gauff v Tanzania*²⁵¹ and the 12 February 2007 decision in *Aguas Argentinas*.²⁵² All three cases involved water treatment concessions granted to foreign investors by Argentina and Tanzania. Due to the environmental implications of such concessions, the settlement of the dispute had an impact far beyond the interests of the parties. Several NGOs applied to the courts for access to hearings, were offered the opportunity to make written submissions and had unrestricted access to the parties' written submissions.

²⁴² Advisory Opinion No OC-1/82 of 24 September 1982.

²⁴³ C Moyer 'The Role of Amicus Curiae in the Inter-American Court of Human Rights' <<https://www.corteidh.or.cr/tablas/a11770.pdf>>.

²⁴⁴ American Convention on Human Rights (Pact of San Jose, Costa Rica, 22 November 1969) <<https://www.refworld.org/docid/3ae6b36510.html>>.

²⁴⁵ Moyer (note 243 above).

²⁴⁶ ICSID Case No ARB/05/22.

²⁴⁷ ICSID Case No ARB(AF)/07/01.

²⁴⁸ ICSID Case No ARB/10/15.

²⁴⁹ ICSID Case No ARB/03/19.

²⁵⁰ ICSID Case No ARB/03/17.

²⁵¹ Note 246 above.

²⁵² Note 249 above.

These decisions show that the admission of amicus curiae can enrich judicial discourse and the quality of judgments. This may prompt Burkina Faso to undertake a legislative reform to provide for the admission of amicus curiae before the courts, more specifically in the field of human rights.

4. The Future of Amicus Curiae in Burkina Faso

Burkina Faso's lack of knowledge of amicus curiae deprives its judicial system of an invaluable tool. Indeed, the intervention of the amicus curiae could be a good opportunity to enlighten national jurisdictions in human rights matters. This is all the more true when we know that the courses in the universities of this country as well as the training of magistrates do not adequately cover the field of human rights which paradoxically abounds in well advised experts who have developed their expertise through their practice before international or regional human rights jurisdictions. Refusing to admit these individuals or NGOs specialising in the field would be tantamount to depriving oneself of significant expertise.

Though civil law jurisdictions do not provide for the intervention of amicus curiae in their legal provisions, experts registered on a court-approved list are often appointed by a judge, either at the request of either party or by the court for the purpose of enlightening it on an issue. In the case of Burkina Faso, this is provided for in the Civil Procedure Code.²⁵³ However, one might ask whether in this case the expert is not more an element of proof than a substantive element of the case since the expert's role is to enlighten the judge on the evidence. In cases where the appointed expert is a legal expert and his or her intervention goes further on substantive elements than on evidence, one comes closer to the notion of amicus curiae in its original conception since the amicus curiae can go beyond the issues and use studies or other evidence to support his or her opinion.

While amicus curiae can be very valuable, it must be recognised that their intervention has not always met the expectations that prevailed when they were admitted to the proceedings. For example, in the *Hendricks* case in Canada, the Supreme Court admitted the Alliance and the Catholic League for Human Rights as amici curiae. At the end of the trial, the Catholic League for Human Rights was accused of having manipulated the proceedings.²⁵⁴ This leads some authors to believe that stricter admission leads to more appropriate participation and to a better appreciation of the contributions of the amicus curiae.²⁵⁵

In view of the above, in the absence of legislative reform on the issue, Burkina Faso's courts are working towards an openness to amicus curiae by interpreting the relevant legislative provisions in a pragmatic manner. However, the best approach would be to reform the law²⁵⁶ in order to clarify the role of the amicus curiae, regulate its intervention and avoid the criticism that justifies the reluctance of certain courts.

²⁵³ Burkinabe Civil Procedure Code arts 288 – 302.

²⁵⁴ *Ligue catholique pour les droits de l'Homme v Hendricks* (19 March 2004) REJB 2004-55341. Several features of the Hendricks case led to the outbursts that occurred. The confusion between amicus curiae status and party status is the most serious criticism that can be levelled at the Court of Appeal ruling. However, on reading the motion to intervene filed by the League and the Alliance, Rolland J should have refrained from authorising their participation as Côté J did in *Québec (Attorney General) v Entreprises W.F.H Ltée* (REJB 2000- 16814 (CA) JE 2000-640).

²⁵⁵ In this sense, the rules of the Constitutional Court of South Africa were adopted allowing a commentator to write that 'the rules are clearly designed to accomplish the aim of amicus participation without ceding Court control over the process'. J Klaaren 'Becoming Friendly with the Constitutional Court: An Interpretation of the Court's Amicus Curiae Rules' (1995) 11 *SAJHR* 499.

²⁵⁶ Noting the risks of manipulation of the procedure and aware of the limits and dangers of extending traditional private law intervention to amicus curiae participation, the Civil Procedure Committee proposed that amicus curiae participation be governed by a specific provision in the Civil Procedure Code. Rapport du Comité de révision de la procédure civile *Une nouvelle culture judiciaire* (July 2001) 125-126.

The admission of amicus curiae with answers to the following questions will optimise their intervention:²⁵⁷ Will amicus curiae be able to intervene spontaneously or only at the invitation of the court? Will the procedure be generalised or restricted to decisions that are likely to establish new jurisprudence or lead to the overturning of decisions? Will rules be needed to regulate their presence or to regulate their participation? Will there be a need for selection, and if so, how? Will judges have to provide reasons for requesting a person to act as amicus curiae or, conversely, for refusing to take into account observations spontaneously submitted? Will the observations produced have to be made public? Is it possible for amicus curiae to have access to the documents in the file? Will the agreement of all parties to the proceedings always be required?

Considering the similarities between French law and the law of French-speaking African countries, particularly Burkina Faso, it is to be hoped that the latter will follow France's lead in opening up to the introduction of amicus curiae in their legal systems. In France, the Code of Procedure in art 27(2) and others introduced the definition of the amicus curiae as designating the person whom the civil court can hear without formalities with the aim of seeking elements likely to inform the court, such as, for example, to know the terms of a local custom or an unwritten professional rule.

5. Conclusion

The amicus curiae mechanism strengthens human rights reforms by enriching judicial discourse and informing the courts through its expertise. Amicus curiae assists the court in reaching a correct decision. Their specialisation on the issue and arrangements for research can be of great help to the courts that admit them. The admission of amicus curiae by Burkina Faso would greatly contribute to emerging jurisprudence capturing international and regional human rights law and its implementation in the country.

²⁵⁷ These are questions raised by R Encinas de Munagorri 'L'ouverture de la Cour de cassation aux amici curiae' RTDCiv Revue trimestrielle de droit civil (2005) 88-93.

CHAPTER 8: The Amicus Curiae Context, Law and Practice in South Africa

Basetsana Koitsioe

1. Introduction

Amicus curiae practice is commonly used by public interest organisations as the procedure is cost effective and does not require an organisation to have a cause of action in order to make submissions in matters in the public interest. It is for this reason that an amicus curiae has become versatile and is said to fulfil a wide range of important functions.²⁵⁸ Plainly put, amicus curiae means friend of the court. The function of an amicus curiae is to educate the court on points of law that are in doubt, gather or organise information, or raise awareness about some aspect of the case that the court might otherwise overlook.²⁵⁹ Participation of amicus curiae in litigation is a well-established practice in South African legal history. South African courts 'are increasingly recognizing that certain matters must necessarily involve the perspectives and voices of organizations or entities that may not have a direct legal interest in the matter'.²⁶⁰

Although there is a well-established practice of amicus curiae in South Africa in public interest litigation sector, there also an ongoing academic debate about whether the use of law can lead to real social change. Many legal realists are sceptical about the ability of law and specifically litigation to 'change society' and bring about actual grassroots change.²⁶¹ On the other hand, legal mobilisation academics and activists have been more optimistic about the potential of litigation to initiate, or play a role in, creating impactful social change.²⁶² Legal mobilisation academics and activists see litigation as only a single stepping stone to social change.²⁶³

This chapter will focus on how strategic litigation has been used to advocate for socio-economic rights as well as women's right.

2. History of Amicus Curiae in South Africa

Amicus curiae is a Latin term meaning 'friend of the court'.²⁶⁴ Amicus curiae participation is traced back to Roman law. For the purpose of this chapter the role of amicus curiae in South Africa will be viewed against the background of public interest litigation which is largely the result of the 'apartheid' era in which human-rights activists and civil society organisations sought to fight the inequalities of the 'apartheid' regime.²⁶⁵

With the advent of South Africa's new constitutional dispensation, a new form of amicus curiae participation was introduced where a non-party requests the right to intervene so that it might advance a particular legal position which it has itself chosen. Public interest organisations have gravitated towards this form because of their focus 'on the wider public interest rather

²⁵⁸ C Murray 'Litigating in the Public Interest: Intervention and the Amicus Curiae' (1994) 10 SAJHR 240, 242.

²⁵⁹ J Robbins 'False Friends: Amicus Curiae and Procedural Discretion in WTO Appeals Under the Hotrolled Lead/Asbestos Doctrine' (Winter 2003) 44 Harvard ILJ 317.

²⁶⁰ J Brickhill & M Du Plessis 'Two's Company Three's a Crowd in Investor-State Arbitration (Piero v South Africa)' (2011) 27(1) SAJHR 152.

²⁶¹ A Hunt 'Rights and social movements: Counter-hegemonic strategies' in M McCann (ed) *Law and Social Movements* (2006) 309.

²⁶² GN Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

²⁶³ 6 Klaaren, Dugard & Handmaker op cit note 21 at 2; MW McCann 'Reform litigation on trial' (1992) 17 *Law and Social Inquiry* 715, 716.

²⁶⁴ H Campbell *Black's Law Dictionary* 2 ed (1910).

²⁶⁵ JC Mubangizi & C Mbazira 'Constructing the Amicus Curiae Procedure in Human Rights Litigation: What Can Uganda Learn from South Africa?' (2012) 16 *Law, Democracy & Development* 199, 208.

than the more private interest of a particular individual'.²⁶⁶ In Black's Law's Dictionary public interest is defined as the general welfare of the public that warrants recognition and protection, and something in which the public as a whole has a stake especial an interest that justifies governmental regulation.²⁶⁷

In South Africa the Constitutional Court was the first court to introduce a rule which made provision for the intervention of an amicus curiae which entrenched a broad concept of standing allowing a group of people to bring an action that alleges an infringement of the Bill of Rights.²⁶⁸ The provision for amicus curiae is made under rule 10 of the Constitutional Court which states that 'any person interested in any matter before the Court may, with the written consent of all the parties in the matter before the Court.²⁶⁹ be admitted therein as an amicus curiae upon such terms and conditions and with such rights and privileges as may be agreed upon in writing with all the parties before the Court or as may be directed by the Chief Justice'.²⁷⁰ In the *Institute for Security Studies: In Re Basson case*,²⁷¹ the court made it clear that no person may be admitted as an amicus curiae without the permission of the court. The court also stated that in exercising its discretion whether to allow a person to act as amicus curiae, it would consider whether submissions are relevant and useful to the court and different from submissions made by the other parties.²⁷² In South Africa an amicus curiae does not have the right to raise a new cause of action and is limited to the record of appeal, unless the new material is, in accordance with rule 31 of the Constitutional Court Rules, common cause or otherwise incontrovertible or is of an official, scientific, technical or statistical nature and capable of easy verification.²⁷³ The restrictions placed on an amicus curiae by the court rules are not necessarily strict and the court has discretion to permit an amicus curiae to adduce additional evidence outside the ambit of rule 31.²⁷⁴

The court in *Institute for Security Studies: In Re Basson* also sets out the steps which an applicant should take in order to obtain admission as amicus curiae. The request submission must place the parties in a position where they can assess properly whether the request complies with the underlying principles governing applications for admission as amicus curiae.²⁷⁵ Those principles are whether the submissions sought to be advanced are relevant to the issues before the court, will be useful to the court and are different from those of the other parties.²⁷⁶ The next step is to seek the leave of the court. If the written consent of the parties has been obtained, it does not follow automatically that the court is bound to admit the applicant. The court may refuse to admit the applicant where the principles referred to have not been satisfied.²⁷⁷

3. Amicus Curiae Development Through the Courts

Sachs J has commented on the role that the amicus curiae played in the landmark case of *Government of the Republic of South Africa v Grootboom*²⁷⁸ (*Grootboom*):

²⁶⁶ Ibid.

²⁶⁷ Black's Law Dictionary (note 264 above).

²⁶⁸ A Spies 'Amicus Curiae Participation, Gender Equality And The South African Constitutional Court' (Dissertation, University of the Witwatersrand 2009).

²⁶⁹ S 2003 - Gn R1675/2003 (31 October 2003).

²⁷⁰ Constitutional Court Rules rule 10 subrule 5.

²⁷¹ *In Re S v Basson* CCT 30/03 (Unreported decision of 9 September 2005) paras 6 and 9.

²⁷² Ibid para 7.

²⁷³ Constitutional Court Rules rule 31.

²⁷⁴ G Budlender 'Amicus curiae' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2008) 8-1. Budlender sets out the factors that a court should take into account in allowing new factual material as: '(a) the delay caused by giving the other parties an opportunity to respond to the new evidence; (b) the Constitutional Court's reluctance to deal with evidential material without having the benefit of the views of another court; (c) the cogency of the evidence; and (d) the importance of the evidence to the matters which the Court has to decide'.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid note 20.

²⁷⁸ [2000] ZACC 19.

I might mention that we were helped at the hearing in a most considerable way by the participation of the Human Rights Commission and the Community Law Centre of the University of the Western Cape. Counsel for the Legal Resources Centre appeared on their behalf and succeeded in broadening the debate so as to require the Court to consider the right of all South Africans to shelter, whether they had children or not ... The case showed the extent to which lawyers can help the poor to secure their basic rights.²⁷⁹

In *The Minister of Health v Treatment Action Campaign*²⁸⁰ the case concerned two issues. Firstly, the right given to everyone to have access to public health care services and the right of children to be afforded special protection and secondly, whether in terms of the provisions of ss 27 and 28 of the Constitution, the government is constitutionally obliged to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout South Africa.²⁸¹ The Minister of Health and the Treatment Action Campaign (TAC), the Institute for Democracy in South Africa (IDASA), the Community Law Centre (CLC) and Cotlands Baby Sanctuary were admitted as amici curiae. In *Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign*²⁸² the court dealt with various applications for admission as amicus curiae to adduce further evidence in the appeal by the government against orders made against it by the High Court in the aforementioned case. In passing its judgment the court set out the role of amicus curiae as follows:

The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence.²⁸³

As shown above the main role of the amicus is to assist courts to promote and protect constitutional rights. The Constitutional Court in *Children's Institute v Presiding Officer and Others*²⁸⁴ dealt with the role of amicus curiae in the High Court. The issue the Constitutional Court addressed was whether the amicus curiae could adduce evidence. Rule 16A of the Uniform Rules of Court (Uniform Rules)²⁸⁵ governs the admission of amicus curiae in the High Court and requires that in addition to amicus describing its interest in the proceedings, a party wishing to be admitted as amicus must deal with the submissions it intends to advance. In so doing, the interested party must 1. clearly and succinctly set out the submissions it seeks to advance if admitted as amicus; 2. explain why these submissions are relevant to the proceedings; 3. set out the 'reasons for believing that the submissions will assist the court'; and 4. explain why the submissions 'are different from those of the other parties'.²⁸⁶ However it must be noted that the word submission does not limit 'submissions' to the legal argument, this was confirmed in *Children's Institute*. The Constitutional Court made clear that 'rule 16A does not prohibit the introduction of evidence by an amicus in a High Court'. It noted that a High Court retains a discretion 'guided by the interests of justice' to determine 'whether, and to what extent, to allow an amicus to adduce evidence in support of its submissions'.²⁸⁷

²⁷⁹ A Sachs 'The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case' in P Jones & K Stokke (eds) *Democratising Development: The Politics of SocioEconomic Rights in South Africa* (2005) 131.

²⁸⁰ [2002] ZACC 15.

²⁸¹ Paras 4 and 5.

²⁸² 2002 (5) SA 713 (CC).

²⁸³ Ibid para 5.

²⁸⁴ [2012] ZACC 25.

²⁸⁵ Rules Regulating The Conduct Of The Proceedings Of The Several Provincial And Local Divisions Of The High Court Of South Africa.

²⁸⁶ *S v Engelbrecht* 2004 (2) SACR 391 (W) para 14.

²⁸⁷ Note 284 above para 39.

In dealing with the role of the amicus curiae as contemplated by the Uniform Rules, the Constitutional Court noted:²⁸⁸

[T]he role of an amicus envisioned in the Uniform Rules is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights. Indeed, Rule 16A(2) describes an amicus as an 'interested party in a constitutional issue raised in proceedings'. Therefore, although friends of the court played a variety of roles at common law, the new rule was specifically intended to facilitate the role of amici in promoting and protecting the public interest. ... The role of a friend of the court can ... be characterised as one that assists the courts in effectively promoting and protecting the rights enshrined in our Constitution.

4. Gaps, Opportunities and the Future of Amicus Curiae Practice

As shown above amicus curiae practice in South African courts, particularly the Constitutional Court, has become a tool for public interest organisations. The majority of cases adjudicated by the Constitutional Court have concerned advancing socio-economic rights as well as gender justice. In 2008 however, Irene Grootboom, the applicant in the *Grootboom* case died homeless in a shack. Although the Constitutional Court gave a landmark judgement celebrated around the world, what is in question is the approach to the subject of remedies for socio-economic rights violations than to other areas of constitutional litigation in the past. The Constitutional Court has tended to hand down 'weak' remedies which do not result in substantive goods and services.²⁸⁹ As observed by legal realists public interest litigation seldom results in the enjoyment of substantive justice. This gap presents an opportunity for the public interest sector to consider. Public interest organisations, when intervening as amicus curiae in future, should bolster their submissions and assist the courts with finding the most appropriate and substantive remedies.

Where amicus curiae participation is rejected, the mere participation and activation done by public interest organisations coupled with advocacy and a media campaign can still lead to impactful results as seen in *Minister of Health v Treatment Action Campaign*.²⁹⁰ The case is a good example of where litigation was only used as a part of the TAC's strategy to address the government's policy on the prevention of mother to child transmission of the HIV virus. In this case, more important than the actual judgment itself was the political leverage. The TAC subsequently used this case as a lobbying tool in the face of lagging government implementation of the judgment. In this sense the judgment was used to promote health policy changes for the previously disadvantaged and institutional reform well after the judgment was handed down. Public interest organisations' use of the amicus curiae practice must be coupled by advocacy and research. An effective media campaign can have the result of winning the case 'outside the courtroom' and in the hearts of the public eventualising in substantive justice being reached.

Amicus curiae participation in criminal cases has not always been encouraged in South Africa. Spies discusses amicus curiae intervention in criminal cases in an article assessing the 2006 case *S v Zuma*.²⁹¹ In this case CALS, the Centre for the Study of Violence and Reconciliation (CSVR) and the Tshwaranang Legal Advocacy Centre (TLAC) lodged an application to intervene as amici curiae.²⁹² In this case the complainant, Khwezi, and the accused, Zuma, were family friends and

²⁸⁸ Ibid paras 26 and 26.

²⁸⁹ C Mbazira 'Grootboom: A paradigm of individual remedies versus reasonable programmes' (2011) 26(1) *Southern African Public Law* 60, 80.

²⁹⁰ Note 280 above.

²⁹¹ A Spies 'Reconsidering the amicus curiae participation in *S v Zuma*: Lessons for future participation' (2015) 28 *SA J of Criminal Justice* 59.

²⁹² Ibid note 6 above. Notice of motion in the joint application of TLAC, CALS and CSVR to be admitted as amici curiae, case number CC321/05.

during an overnight visit to Zuma's home Khwezi was allegedly raped by Zuma.²⁹³ Zuma pleaded not guilty to the charge, admitting that he and Khwezi had sex, but claiming that the intercourse was consensual.

According to Spies the main question in court was whether there had been consent to the sexual intercourse.²⁹⁴ After Khwezi's evidence, Zuma's defence team brought an application to cross-examine Khwezi on her past sexual history and to lead evidence in connection therewith. The High Court granted the request stating it would give reasons for its decision at a later time. After the state closed its case CALS, CSVr and TLAC lodged an application to intervene as amici curiae. According to Spies, these organisations, after being granted leave to participate in the proceedings as amici curiae, were faced with a difficult strategic choice on how they were going to frame their arguments to balance the individual and broader issues of the case.²⁹⁵ In their application for admission, they stated that they intervened not only in their own interests, but also in the interest of the community, which included women and children who were victims of sexual violence. The amici curiae argued that the case raised important constitutional issues that went to the heart of the enjoyment of women's constitutional rights and that their participation would 'enable substantive issues of social and legal significance to be properly ventilated in the interest of a fair trial and will also ensure utilisation of common law processes in a manner consistent with the constitutional principles'.²⁹⁶ The amici curiae maintained that the social context evidence that they would bring would place the High Court in a better position to make a decision 'confident of its social consequences'.²⁹⁷

Ultimately, the High Court rejected the application for admission by the amici curiae. The judge responded to the amici curiae in his final judgment where he stated that: 'People commented on the ruling without having been in Court or knowing anything about the contents of the application, or the provisions of s 227 of the Act'.²⁹⁸ For Spies, it is clear that the judge viewed the amici curiae's submissions and planned participation as a personal attack on his judicial integrity and that the purpose of the participation was misconstrued by the amici curiae in their submissions.

Since this case amicus curiae participation in criminal trials has not been explored to its fullest potential. This is a gap that should be explored by public interest organisations to agitate criminal courts to open a space for amicus curiae participation.

6. Conclusion

The development of amicus curiae practice in South Africa, particularly in the Constitutional Court, has an impressive collection of cases regarding the advancement of socio-economic rights and gender justice. It can be said that public interest organisations in South Africa approach strategic litigation from a legal mobilisation perspective. This approach is not only about supporting victims/survivors in their efforts to seek redress by providing financial and technical legal resources, but also about actively participating in the social framing of the issues.²⁹⁹ Amicus curiae plays the important role of informing judges about an issue, and encouraging them to become more comfortable with the scope of the problem and/or to identify with victim/survivor.³⁰⁰

²⁹³ S v Zuma supra (n14) facts as portrayed in the headnote.

²⁹⁴ Spies (note 291 above).

²⁹⁵ Ibid. at 66.

²⁹⁶ Ibid at 66.

²⁹⁷ Ibid at 66

²⁹⁸ Criminal Procedure Act, 1977.

²⁹⁹ WK Taylor 'Creating A Sense of Obligation: Legal Mobilization For Social Rights' (Dissertation, Cornwell University 2019) 252.

³⁰⁰ Ibid.

Legal realists rightly observe that, although amicus practice has yielded many victories, the effect of progressive judgments have not made their way to the people on the ground facing the violations. In order for public interest litigation to create social change, more has to be done to strengthen remedies and structure them in a way that ensures substantive change. Media campaigning is an essential tool to create awareness, educate and empower communities around the country, local radio stations and other local mediums must be engaged to ensure maximum impact. Translating judgments into different languages but also into meaningful tools people can use to assert their rights is essential.

Author Profiles



Arianne Gouem (Burkina Faso)

Arianne is a strategic litigation lawyer and a member of the Burkina Faso and Quebec Bar. She has also developed extensive expertise in the promotion of human rights, specifically those of women, democracy and good governance, gender and sustainable development, and assists several international organisations in these areas. Arianne advocates for the improvement of the status of women and the promotion of women's rights. To this end, she is interested in strategic litigation with the aim of accelerating compliance with regional and international instruments for promoting women's rights. She is fighting alongside several national and international organisations and associations to put an end to the pretexts used for maintaining inequalities.



Annick Imboua-Niava (Burkina Faso)

Annick is a lawyer from Côte d'Ivoire practicing since 2001. She currently works with GEPALF whose goal is to fight against the violation of women's rights and the empowerment of Women as their Strategic Litigation lawyer. As a former member of the Ivorian association of Women lawyers she is very much aware of the strong influence strategic litigation would have in Côte d'Ivoire. Annick holds an LLM Degree from the University of Pittsburgh in International Business transaction. She is very interested in Strategic litigation focused on Women's rights and is a member of The Zonta Club of Abidjan which aim is to promote the rights of Women and Girls.



Beatrice Kayaga (Uganda)

Beatrice is a human rights lawyer at the Women's Probono Initiative in Uganda, leading advocacy on impact litigation of indigent women and girls. She has undertaken various investigations into human rights abuses such as sexual violence faced by persons with mental disabilities in Gulu District. Beatrice has handled cases involving domestic violence, human trafficking, child marriages and sexual violence; and conducted litigation surgeries where lawyers who are like minded agree on issues to litigate and develop an advocacy plan for the litigation. Her interests are human rights and advocacy especially women's and children's rights, activism for marginalised groups, sexual reproductive and health rights, economic rights and conflict resolution.



Emily Kinama (Kenya)

Emily is an Advocate of the High Court of Kenya with an LLB and LLM from the University of Pretoria and a postgraduate diploma from the Kenya School of Law. She is a litigation and research counsel at Katiba Institute, conducting public interest litigation, research and publishes articles on constitutional and human rights issues. Emily worked as a law research clerk to the Justices at the Supreme Court of Kenya and the Constitutional Court of South Africa; as an academic associate at the faculty of law, University of Pretoria and lecturer at the Faculty of Law, the African Nazarene University; and served in the Public Interest Litigation and Legal Aid Committee of the Law Society of Kenya.

Basetsana Koitsioe (South Africa)

Basetsana is a human rights lawyer and dedicated activist at the Centre for Applied Legal Studies (CALS). She specialises in gender justice lawyering focusing on gender-based violence, in particular the trauma and structural violence people face when they are failed by the very systems that are meant to protect. She works on home, land and rural democracy, focusing on the progressive protection for socio-economic rights, ensuring that these rights are realised by the state; provides legal advice and undertakes litigation on behalf of communities and civil society organisations in line with CALS's litigation strategy and priorities in order to achieve strategic change and improved practice. Basetsana holds a BA degree in Political Science and English Literature and an LLB degree from Witwatersrand University.



Kumvana Mlumbe Mtukule (Malawi)

Kumvana is a human rights lawyer and an in-house Counsel at Women's Legal Resources Centre (WOLREC) in Malawi. Kumvana litigates for women who are victims of gender-based violence, illegal land seizure, property and deceased estates. Kumvana trains community paralegals to entrench socio-economic empowerment and gender justice within community-level social and governance structures. Kumvana is also responsible for a project working with tea industry smallholder commercial farmers empowering them so they can advocate for better conditions. Kumvana also guest lectures at the Polytechnic University of Malawi, lecturing a module of human rights, welfare and gender in a final year physical planning course.



Kago Rapula Mokotedi (Botswana)

Kago obtained his LLB at the University of Botswana and proceeded to obtain his LLM in 2015 at the University of Pretoria. He is an admitted practicing attorney in Botswana. He was previously employed as the Executive Director of the Institute of Labour and Employment Studies (ILES) in Botswana which specialises in labour and employment law training. He is a lecturer of law at the University of Botswana. His areas of interest are human rights law, constitutional law and labour law.



Isabella Mwangi (Kenya)

Isabella is a feminist with over seven years' experience in working on children's and women rights. Isabella has an LLB from the University of Nairobi and is interested in strategic litigation with a feminist focus. She has chaired the Kilifi County Gender Based Violence (GBV) Network (2015-2017) where she advocated for proper reporting and referral mechanisms on violation to legal structures for purposes of access to justice; and played a key role in capacity building members on the laws and policies related to GBV, held consultative meetings with key stakeholders, including the development of the Terms of Reference for Kilifi GBV, technical working group.





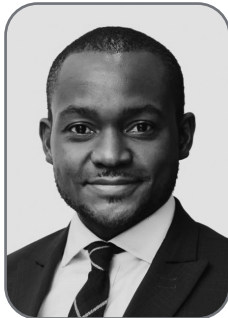
Vivian Mwende Wambua (Kenya)

Vivian is an Advocate of the High Court of Kenya, trained trial advocate by Justice Advocacy Africa (JAA) and a graduate of Jomo Kenyatta University of Agriculture and Technology (JKUAT) with a Post Graduate Diploma from Kenya School of Law. She is also a certified mediator trained by Mediation Training Institute (MTI). Vivian is a Legal Counsel at FIDA-Kenya's Nairobi Office. She is passionate about women's and girl's rights, specifically using the law to address structural inequalities and gender discrimination. Vivian is a litigator with legal experience in aspects including but not limited to family law, reproductive health rights, succession and women's land rights.



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Valentine is the Legal Counsel at the Kenya Legal and Ethical Issues Network on HIV and Aids (KELIN). She is an Advocate of the High Court of Kenya who holds a Master of Laws in Human Rights from the Central European University (Budapest), a Master of Business Administration (Human Resource Management) from Daystar University (Nairobi) and a Bachelor of Laws from the Catholic University of Eastern Africa (Nairobi). She has ten years professional experience, which has been gained from her previous positions as a legal researcher in the Judiciary of Kenya, a lecturer at the Kenya School of Law and in private practice.



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Abigail currently lectures in the Mercantile and Labour Law department at the University of the Western Cape (UWC), South Africa. She is also a research associate at the Centre for Transformative Regulation of Work, UWC, Cape Town. Abigail's research background is in working poverty, sustainable development and policy reform, with a specific interest in the informal economy in Sub-Saharan Africa. She recently completed a post-doctoral fellowship with the Fairwork Project. She holds a PhD in labour law from the University of Cape Town.



Sibongile Ndashe

Sibongile is the Executive Director of the Initiative for Strategic Litigation in Africa (ISLA). She founded the organisation in 2014. Sibongile studied law at the University of the Western Cape and, later, started her legal career in 1999 as an Article Clerk at the Legal Resources Centre before moving to the South African Constitutional Court as a Research Clerk. Her experience as a Research Clerk led her to realise that she wanted to earn a living trying to close the gap between how things are and how things should be. In 2002, Sibongile moved to the Women's Legal Centre (WLC), South Africa, as the lead lawyer for the organisation's work on women's property rights and access to resources. This work focused on expanding protection for women using what was then a new Constitution. Litigation, law reform and public education were some of the core activities under her portfolio.

Key achievements include parliamentary submissions on the Traditional Leadership and Governance Framework Bill and Communal Land Rights Bill, working with the Law Reform Commission on Islamic Marriages Draft Bill and the Hassam v Hassam case that led to the development of the Intestate Succession Law to protect polygamous marriages as provided for in the Maputo Protocol. In 2007, Sibongile joined the International Centre for the Protection of Human Rights (INTERIGHTS), United Kingdom, as the lead lawyer on equality in Africa. Her focus areas were litigating sexual rights and women's human rights and this work included the first case on women's rights at the African Commission on Human and Peoples' Rights, *Al-Kheir and others v Egypt*. She gained a 'bird's eye' view on how the law and courts in particular can be used to advance the human rights of women and people whose rights are violated on the basis of sexual orientation, gender identity and expression on the continent. Sibongile's work is driven by developing jurisprudence in gender and sexuality, before the African human rights system and domestic courts. Through her work, she is nurturing a pool of feminist litigators with expertise on gender and sexuality in addition to the legal empowerment of social movements to make decisions about litigation. She writes, teaches, designs and implements capacity strengthening programmes on strategic litigation for lawyers and social movements.

Ruth Nekura

Ruth is a human rights lawyer and socio-legal researcher with ten years' experience working in gender equality and women's rights with a focus on law and policy reform, advocacy and programme implementation. Her work involves conducting gender analyses of laws and implementation practices. She is passionate about access to justice and invokes both structural and individual level analyses to challenge systemic inequality and re-imagine ways of overcoming barriers to women's access to justice. She is an advocate of the High Court of Kenya and holds an LLM (Human Rights Law) and a PhD (in Public Law) from the University of Cape Town. Her PhD research used a feminist human rights approach to assess the fulfilment of state responsibility to act with due diligence to prevent and effectively respond to violence against women and girls, through the implementation of multi-sector approaches (One-Stop-Centres) that integrate health, legal and psychosocial services to support victims of sexual violence in Kenya and South Africa, comparatively. She previously worked with the Coalition on Violence Against Women (COVAW), Kenya Law Reform Commission and the Centre for Law and Society (UCT).



She has provided technical expertise to various other organisations and initiatives at different levels; from supporting social movements at the grassroots level to national and international non-governmental organisations, such as the World Health Organization (WHO), Womankind Worldwide, the Kenya Network of Organisations Working on the Rights of Women/Girls with Disabilities, the American Jewish World Service (AJWS), International Federation of the Red Cross and UN Women- Kenya.

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